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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VINCENT C. LOMBARDI, *et al, Petitioners,*

v.

DOW CHEMICAL COMPANY, *et al., Respondents.*

RICHARD PINKNEY, *et al., Petitioners,*

v.

DOW CHEMICAL COMPANY, *et al., Respondents.*

CLARA FRATICELLI, *et al., Petitioners,*

v.

DOW CHEMICAL COMPANY, *et al., Respondents,*

and

GERALD HOGAN, *Petitioner,*

v.

DOW CHEMICAL COMPANY, *et al., Respondents.*

In re "Agent Orange" Product Liability Litigation

SINGLE APPENDIX
(Volume II, Pages 621a-791a)

WAYNE MICHAEL MANSULLA
(Counsel of Record)
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioners

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

INDEX
Volume I

Description	Page
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 506 F.Supp. 762 (1980)	1a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 534 F.Supp. 1046 (1982)	76a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 565 F. Supp. 1263 (1983)	102a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740 (1984)	135a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (1983)	456a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1223 (1985)	492a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation, Lilley v. Dow Chemical Co.,* 611 F.Supp. 1267 (1985)	580a

Volume II

District Court Opinion: *In re "Agent Orange" Product Liability Litigation, Fraticelli v. Dow Chemical Co.,* 611 F.Supp. 1285 (1985)	621a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation, Hogan v. Dow Chemical Co.,* 611 F.Supp. 1290 (1985)	630a
District Court Opinion: *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 (1980)	641a
Court of Appeals Opinion: *In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (1984)	668a

Page

Court of Appeals Opinion: *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145 (1987) 676a

Court of Appeals Opinion: *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 187 (1987) 752a

Court of Appeals Opinion: *In re "Agent Orange" Product Liability Litigation, Hogan v. Dow Chemical Co., Fraticelli v. Dow Chemical Co.,* 818 F.2d 210 (1987) 766a

Court of Appeals Orders Denying Petitions for Rehearing *En Banc* 777a

Court of Appeals Orders Staying Issuance of the Mandate 780a

List of Parties Below:
Opt-Out Plaintiffs 786a

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

Clara FRATICELLI, et al., Plaintiffs,

v.

The DOW CHEMICAL CO., et al., the United States of america, etc., Defendants.

MDL No. 381.
CVD-82-1734.

United States District Court,
E.D. New York

May 9, 1985.

Robert C. Taylor, Jr., Ashcraft & Gerel, Washington, D.C., Michael R. Salling, Fernandes, Salling & Salling, Kapaa, Kauai, Hawaii, for plaintiffs.

Leonard Rivkin, Rivkin, Leff, Sherman & Radler, Garden City, N.Y., Philip Pakula, Townley & Updike; Wendell B. Alcorn, Jr., Cadwalader, Wickersham & Taft; William Krohley, Kelley, Drye & Warren; Thomas Beck, Arthur, Dry & Kalish; Bruce Hecker, Shea & Gould, New York City, of counsel; David R. Gross, Budd, Larner, Kent, Gross, Picillo & Rosenbaum, New York City; Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, Ill.; Henry G. Miller, Clark, Gagliardi & Miller, White Plains, N.Y.; Tany S. Horg, Atty. Gen.; Michael A. Lilly, Lawrence K. Lau & Gerald C. Yoshi, Deputy Attys. Gen., Honolulu, Hawaii; Arvin Maskin, Robert C. Longstreth, Dept. of Justice, Washington, D.C., for defendants.

WEINSTEIN, Chief Judge.

I. INTRODUCTION

Defendants have moved to dismiss or in the alternative for summary judgment. They are the seven manufacturers of Agent Orange; its purchaser, the United States; and the former Regents of the University of Hawaii which tested the product. Plaintiffs Clara Fraticelli, wife of William Fraticelli (deceased), James K. Oshita, and Masao Takatsuki, sue on behalf of themselves and a class of 35,000 unnamed residents of Kauai County, Hawaii, alleging that they were all harmed by exposure to Agent Orange. Jurisdiction is premised on 28 U.S.C. §§ 1331, 1332, 42 U.S.C. § 1983, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. For the reasons stated below, the motions must be granted.

II. FACTS

Fraticelli, Oshita, and Takatsuki were civilians employed at the University's Kauai Experimental Station for Tropical Agriculture. Fraticelli worked in the fields as an Equipment Operator from 1946 until his retirement in 1972. Oshita was similarly employed from 1961 to 1982 and Takatsuki from 1961 to 1980.

In 1966 and 1967 the University, pursuant to a contract with the United States Department of Defense, conducted tests by spraying on its fields chemicals including arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead, flourine, 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin ("TCDD" or "Dioxin") and other herbicides.

All three employees claimed exposure during a 1967 incident. They stood by their tractors, which had been marked with flags as targets for aerial herbicide spraying, and

were "drenched" by a substance they believe was Agent Orange manufactured by one or more of the defendants. They also believe they were exposed on two other occasions. No protective clothing or showers had been provided.

Fraticelli died in April 1981 as a result of lung and kidney cancer. He had a history of bladder cancer (which did not recur after surgery), a metastatic brain tumor, priapism dating back to 1962, and migraine headaches dating back to 1946. He drank "2 to 3 shots of whiskey per day for many years," had family problems to which he attributed his headaches and tensions, and smoked over one pack of cigarettes per day, which his doctors told him was "excessive." (Hospital Record 7/23/73.)

Oshita was diagnosed as having liver dysfunction in 1969. In 1971 he had a kidney stone and was diagnosed as having cancer of the bladder, which has not recurred since surgery at that time. In 1980 chronic hepatitis was present, and he alleged that he also suffered from diabetes, anemia and chloracne at one time or another. He claims he discontinued "moderate" drinking in 1971 and smoked one pack of cigarettes per day for over 30 years. His hospital records indicate no chloracne but do show that he "smokes at least 1½ packs a day and used to drink quite a lot of alcoholic drinks." (Hospital Record 11/23/71.) His father died of stomach cancer at age 60. His maternal grandfather died of cancer, and his two brothers both have histories of kidney trouble.

Takatsuki was diagnosed as having cancer involving the undersurface of the tongue and floor of his mouth in late 1978. He has a 60-80 pack per year history of smoking and also a moderate alcohol intake, "mostly bourbon." (Medical Center Record 10/10/78.) He was treated with

radiation therapy and there has been no recurrence as of February, 1985. This plaintiff also claims to suffer from chloracne although there is no mention of this in his medical records supplied to the court.

In none of the extensive medical records of treating physicians and hospitals supplied by plaintiffs' counsel could the court find any reference to Agent Orange. Nevertheless, plaintiffs' expert, Dr. Samuel P. Epstein, had no doubt that plaintiffs' various complaints were caused by Agent Orange even though he had never seen any of the plaintiffs. *See* Epstein affidavit, March 9, 1985; *see also* the full discussion of Dr. Epstein's evidence in *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1223 (E.D.N.Y. 1985). His is the only evidence supporting plaintiffs' case. The facts in the instant case require rejection of Dr. Epstein's proposed testimony. *Id.*

All three plaintiffs filed workers' compensation claims in which they listed each other as witnesses to the claimed 1967 incident and asserted knowledge of the causal nexus between their illnesses and exposure to chemicals: Fraticelli's claim, filed October 1, 1979, asserts knowledge in September, 1979; Oshita's claim, filed July 12, 1979, asserts knowledge on July 11, 1979; and Takatsuki's claim, filed January 7, 1981, asserts knowledge at an unspecified day in January, 1979. Mrs. Fraticelli field a workers' compensation death benefit claim on May 28, 1981.

In their workers' compensation claims plaintiffs characterize their injuries as having been caused by a host of toxic substances:

> latent slow acting diseases from occupational exposure to arsenic and/or benzol, and/or beryllium, and/or zirconium, and/or cadmium,

> and/or chrome, and/or lead, and/or fluorine, and/or other toxis chemicals *including but not limited to* dibenzo-p-dioxin (TCDD or Dioxin) and other toxic herbicides, *including but not limited to* phenoxy herbicides.

(Emphasis supplied.)

On April 21, 1982 the State of Hawaii Department of Labor issued its decision accepting liability in both Fraticelli claims and awarding his widow compensation in an aggregate amount of slightly more than $73,000. On October 19, 1981, the Department awarded James Oshita slightly more than $23,000 for a period of total disability, for permanent partial disability, and for disfigurement from surgical scars. Plaintiff Takatsuki has indicated only that his workers' compensation claims were pending; based upon their common exposure and the Department of Labor decision as regards Fraticelli and Oshita, it is assumed, without objection from counsel, that Takatsuki has also obtained workers' compensation.

On January 16, 1979 plaintiffs' Hawaiian counsel entered into an agreement with the Agent Orange Plaintiffs' Management Committee to join in the Agent Orange Product Liability Litigation, MDL No. 381. Yet plaintiffs did not file their complaint, Civ. No. 82-0021, in the Hawaii district court until January 11, 1982. The Multidistrict Litigation Panel then transferred the Hawaii action to the Eastern District of New York.

All three plaintiffs submitted administrative claims to the United States on January 7, 1981. There is no information indicating that these claims have been acted upon by the government.

III. LAW

A. *Class Action*

Plaintiffs in this action fail to meet the prerequisites of a class action in any respect save numerosity. Fed.R.Civ. P.23. The population-at-large of Kauai County, Hawaii cannot make any claim in common with that based on injuries sustained by these employees during experiments at the University of Hawaii. No harm to the residents of Kauai County from contaminated herbicides has been shown. Plaintiffs have not demonstrated a common interest with the populace relative to their own work experiences at the Experimental Station. Class certification was properly denied.

B. *Statute of Limitations*

Plaintiffs' claim against the chemical companies and the University's Former Regents is governed by the two-year Hawaii statute of limitations for tort actions, which provides:

> Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued * * *.

Haw. Rev. Stat. § 657-7 (1976).

The Supreme Court of Hawaii has held that a claim accrues when the plaintiff discovers, or reasonably should have discovered, the "negligent act, the damage, and the causal connection between the former and the latter." *Yamaguchi v. Queen's Medical Center*, 65 Haw. 84, 648 P.2d 689, 693-94 (1982).

Plaintiffs Oshita and Takatsuki and plaintiff Fraticelli's husband all knew of the act, the damage and the causal

nexus more than two years prior to the filing of this action on January 11, 1982. Oshita filed a workers' compensation claim for the injuries on July 12, 1979; he stated that he knew "of his disability resulting from his exposure to" phenoxy herbicides and dioxin on July 11, 1979. Takatsuki filed a Workers' Compensation claim for the injuries on January 7, 1981; he stated that he knew "of his disability resulting from exposure to" phenoxy herbicides and dioxin "in January, 1979." When Fraticelli filed a Workers' Compensation claim on October 1, 1979 for his alleged injuries, he stated that he knew "of his disability, resulting from exposure" to phenoxy herbicides and dioxin "in September 1979."

The latest date on which plaintiffs may be said to have "discovered" the causal connection was September 1979, more than two years prior to institution of the Hawaii district court action. These are all civilian claims. The certification of veterans' claims as a class action had no effect in tolling the statute of limitations. There was no tolling of the statute by any concealment.

Wrongful death claims must be filed within two years of the date of death. Haw. Rev. Stat. § 663-3. Fraticelli died on April 27, 1981. The wrongful death action was timely filed on January 11, 1982. As indicated below, this claim must be dismissed for other reasons.

Accordingly, all claims of plaintiffs Oshita and Takatsuki against the chemical companies and the Former Regents of the University of Hawaii and all claims of plaintiff Fraticelli, other than for wrongful death, are barred.

The Federal Tort Claims Act requires, as prerequisite to suit against the United States, a filing of an administrative

claim within two years of accrual. 28 U.S.C. § 2401(b) (Supp. 1984).

Certified mail receipts show that administrative claim forms were received by the government on January 12, 1981. While the argument of the government that plaintiffs must have known of their claims prior to January 12, 1979 is persuasive, there is no need to decide that factual question now. There is also no point in analyzing the government's contention that plaintiffs have failed to exhaust their administrative remedies. *See* 28 U.S.C. § 2675(a).

C. *Election of Remedies*

Plaintiffs' claim against the Former Regents of the University of Hawaii is barred by their receipt of workers' compensation funds. Haw. Rev. Stat. § 386-5. The statute provides:

> The rights and remedies herein granted to an employee or his dependents on account of a work injury suffered by him shall exclude all other liability of the employer to the employee, his legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

The statutory compensation remedy for workers is exclusive. *Evanson v. University of Hawaii,* 52 Haw. 595, 483 P.2d 187 (1971). *See also Jordan v. Rita,* 670 P.2d 457 (S. Ct. Haw. 1983).

D. *Causation*

Plaintiffs have submitted scientific expert testimony in the form of medical affidavits. These affidavits suffer from the same defects as those discussed at length in the decision dismissing claims of veterans who opted out of the class. *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1223 (E.D.N.Y. 1985). The same Epstein affidavits already rejected, *id.* at 1238, have also been relied upon by plaintiffs in the instant case as their main support for resisting summary judgment.

As with the veteran plaintiffs, there is no admissible evidence that Agent Orange caused plaintiffs' illnesses. Like many veterans, Fraticelli and Oshita smoked and consumed alcohol. All plaintiffs freely admit exposure to many toxis chemicals other than Agent Orange. There is evidence of family histories of cancer and kidney disease. Some of Fraticelli's symptoms actually predated his alleged exposure to dioxin. As with the veterans who opted out, the expert and other evidence that these plaintiffs rely upon "fail(s) to show how the myriad illnesses at issue are more likely caused by Agent Orange than by something else. Their conclusions are wholly speculative." 611 F. Supp. at 1253.

The motion for summary judgment by all defendants against all plaintiffs must be granted. The action is dismissed without costs or disbursements. This opinion constitutes a final judgment.

SO ORDERED.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

Gerald HOGAN, M.D., Plaintiffs,

v.

The DOW CHEMICAL CO., et al., Defendants.

MDL No. 381, CV-81-991.

United States District Court,
E.D. New York.

May 10, 1985.

Robert C. Taylor, Jr., Ashcraft & Gerel, Washington, D.C., for plaintiffs.

Leonard Rivkin, Rivkin, Leff, Sherman & Radler, Garden City, N.Y., Philip Pakula, Townley & Updike; Wendell B. Alcorn, Jr., Cadwalader, Wickersham & Taft; William Krohley, Kelley, Drye & Warren, Thomas Beck, Arthur, Dry & Kalish, David R. Ross, Budd, Larner, Kent, Gross, Picillo & Rosenbaum, New York City; Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, III.; Henry G. Miller, Clark, Gagliardi & Miller, White Plains, N.Y., for defendants; Bruce Hecker, Shea & Gould, New York City, of counsel.

Arvin Maskin, Dept. of Justice, Washington, D.C., for third-party defendant United States.

MEMORANDUM, ORDER, and JUDGMENT

WEINSTEIN, Chief Judge:

Defendants, seven chemical companies who manufactured the herbicide Agent Orange, have moved to dismiss Dr. Gerald Hogan's claims or in the alternative for summary judgment. Fed. R. Civ. P. 12(b), 56(b). They also seek dismissal for failure to comply with a discovery order. Fed. R. Civ. P. 37(b) and (d). Plaintiff opposes these motions and urges that diversity of citizenship did not exist at the time the suit was brought, making removal to federal court improper.

As indicated below, removal was proper. Plaintiff's willful failure to comply with a discovery order and his failure to produce any evidence sufficient to show a causal connection between his injuries and exposure to Agent Orange require dismissal.

I. FACTS

Hogan is a medical doctor who worked as a civilian contract physician for the United States Agency for International Development in a hospital in Vietnam in 1966. He was in Vietnam for no more than four months. During the first month he worked in a surgical and medical hospital located in the center of the City of Da Nang. He left the city only once during that month to visit a Special Forces camp 75 miles southwest of the city. The rest of his time in Vietnam he was a hospital patient.

Hogan claims that during that first month he was exposed to Agent Orange because of his physical contact with Vietnamese who had been exposed to Agent Orange and because dioxin was in Da Nang dust. He was diagnosed in

Vietnam as having had an allergic reaction to penicillin or other allergens, an allergy which plaintiff was known to have had prior to his arrival in that country.

Upon his return from Vietnam, plaintiff was found to have allergic reactions to house dust, airborne molds, grasses, ragweed, cattle and dog hair, feathers, wool, silk, chocolate, and cola. He resumed his medical practice in cardiovascular surgery at Georgetown University in 1967, but left this position in 1971 due to declining health.

Currently, plaintiff claims that the following diseases and symptoms over the last 18 years result from his exposure to Agent Orange: elevated triglicerides; elevated C4 (B1-E-Globulin); immune deficiency; environmentally triggered vasculitis; hemi Parkinson's disease; acne-like rash of the premalar area; weakness in extremities (possible peripheral neuropathy); hypoactive reflexes (possible peripheral neuropathy); chest pains; palpitations; and arrythmia.

The skin rashes, progressive vasculitis, and general deterioration of neurological functions were identified in 1975. The remaining illnesses were diagnosed in 1978 and subsequently.

II. PROCEDURAL HISTORY

On January 29, 1981, plaintiff sued the chemical companies in the Second Judicial District Court of Nevada. He charged that the defendants knew of the danger of contact with Agent Orange and failed to warn him.

In February 1981, defendants removed the suit to federal court based on diversity of citizenship. 28 U.S.C. §§ 1332 and 1441. Plaintiff did not challenge the removal. Once in federal court, the action was transferred

to this court as part of the "Agent Orange" product liability litigation, MDL 381.

In August 1984, defendants moved to dismiss or, in the alternative, for summary judgment. Plaintiff did not reply and defendants obtained a default judgment. Plaintiff's Rule 60 motion to reopen was granted and defendants renewed their motions.

III. LAW

A. *Jurisdiction*

Responding to defendants' motion to dismiss or for summary judgment plaintiff suggests that no diversity exists. He states that since 1979 he has spent time in California, Hawaii, Mexico, Texas, Florida and the Bahamas as well as in Nevada. It is to this jurisdictional issue that we first turn. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-84, 56 S.Ct. 780, 782-83, 80 L.Ed. 1135 (1936).

A statement of residence says little about domicile; it only declares where a party is living. *John Birch Society v. National Broadcasting Co.*, 377 F.2d 194, 199 (2d Cir. 1967). To change domicile, a person must take up residence in a different place with the intent of remaining there. *Mas v. Perry*, 489 F.2d 1396, 1399-1400 (5th Cir.), *cert. denied*, 419 U.S. 842, 95 S. Ct. 74, 42 L. Ed. 2d 70 (1974)

Diversity at the time suit was brought provides sufficient predicate for jurisdiction. *Stevens v. Nichols*, 130 U.S 230, 231, 9 S.Ct. 518, 519, 32 L.Ed. 914 (1889). Jurisdiction having once been vested, it is not divested by a later change of domicile. *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959).

Since plaintiff has never claimed a domicile other than Nevada, he is a citizen of Nevada. All the evidence supports that conclusion. In his Rule 60 motion plaintiff's affidavit refers to Nevada as his "home state" when he brought suit. *See Sun Printing and Publishing Association v. Edwards,* 194 U.S. 377, 382, 24 S.Ct. 696, 697, 48 L. Ed. 1027 (1904). In their removal papers, defendants asserted that plaintiff was a citizen of Nevada and plaintiff failed to deny or to challenge removal; failure to object at that time can be taken as an admission. *Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92, 97-98, 42 S. Ct. 35, 37-38, 66 L. Ed. 144 (1921). Even now, his home appears to be in Nevada for that is where he repaired to give his deposition. The court has diversity jurisdiction.

B. *Rule 37 Motion to Dismiss*

Pursuant to the Magistrate's Pretrial Order Number 36, defendants began what was to have been two days deposing plaintiff in his home in Las Vegas on March 21, 1985. The deposition began in the morning and lasted until noon. After lunch, plaintiff's attorney informed defendants' counsel that plaintiff was not able to continue with the deposition. Plaintiff claimed to be suffering from cardiac arrhythmia resulting from atmospheric conditions. There was no claim in the record of fatigue or mental confusion.

The following day, plaintiff refused to continue and suggested that he was considering discontinuing the suit. On March 27, the issue of the suspended deposition was raised with the Magistrate by telephone. At that time plaintiff declared that he would continue the suit but he sought an indefinite suspension of the deposition because of ill health. In support of his contention he submitted an

affidavit of Dr. William Rea, a Dallas physician. Based on a telephone call from plaintiff in Las Vegas to Dr. Rea in his Texas office, Dr. Rea concurred in plaintiff's self-diagnosis that plaintiff was suffering from cardiac arrhythmia, fatigue and mental confusion resulting from the stress of the deposition.

Defendants objected to plaintiff's request, arguing that the telephonic diagnosis without any tests or physical examination was insufficient. The Magistrate ordered an independent examination. It was conducted on April 1, 1985 by Dr. Samuel Spagnolo, the Director of the Division of Pulmonary Disease and Allergy and Professor of Medicine at George Washington University School of Medicine.

Dr. Spagnolo found plaintiff's electrocardiogram normal and discovered no undue fatigue or mental confusion. On April 2, in a telephone conference with all parties and the Magistrate, plaintiff offered no additional evidence in support of his request for an indefinite suspension of his deposition. Finding that plaintiff had not sustained his burden, the Magistrate ordered the deposition to continue, but reduced it to one day's duration. In consideration of plaintiff's allergies, the Magistrate suggested that the deposition be held in a hospital on April 4. Speed was essential since a final argument on the long-pending motion for summary judgment had been scheduled for April 15.

On April 3, plaintiff's counsel informed the Magistrate that plaintiff refused to abide by the discovery order because he felt physically unable to do so. He did not wish to voluntarily dismiss the suit but he was aware of the potential consequences of his refusal to obey the

Magistrate's order. Plaintiff claimed that Dr. Spagnolo's report was inaccurate and that he suffered from cardiac arrhythmia during the examination and continued to do so.

Defendants moved to have the claim dismissed. Fed. R. Civ. P. 37(b)(2). A hearing on this motion was held on April 15 by the court. There was no indication at the argument that plaintiff intended at any time to comply with the Magistrate's order.

Rule 37(b)(2) permits a wide panoply of sanctions against a party who fails to obey a discovery order. It provides in relevant part that:

> If a party * * * fails to obey an order to provide or permit discovery* * * the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * * * * * * *
>
> (C) An order striking out pleading or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party* * * *

(Emphasis supplied.)

The strength of any sanction under the Rule must be proportionate to the degree and effect of a party's defiance of the discovery process and orders of the court. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites,* 456 U.S. 694, 192 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). While courts are reluctant to do so, in extreme cases they have an obligation to apply the ultimate sanc-

tion of dismissal. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L.Ed.2d 747 (1976); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958); *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907, 97 S. Ct. 1178, 51 L. Ed. 2d 583 (1977); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974). Dismissal is particularly appropriate when, despite a clear warning, a party willfully disobeys a court order. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976); *see also* Note, "The Emerging Deterrence Question in the Imposition of Discovery Sanctions," 91 Harv. L. Rev. 1033, 1048-50 (1978).

Failure to cooperate in discovery is particularly objectionable when there is a substantial doubt about whether there are facts sufficient to support a claim. *Fonseca v. Regan*, 783 F.2d 944 (2d Cir.), *cert denied*, ____ U.S. ____, 105 S. Ct. 249, 83 L. Ed. 2d 1986 (1984); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 249, 85 S. Ct. 934, 13 L. Ed. 2d 818 (1965). The plaintiff, having placed the origin of his illness in issue, may not now refuse to cooperate with defendants in discovery concerning the crucial question of causation. A willful failure to comply with the court's order may be taken as an admission that plaintiff's claims lack merit. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 351, 29 S. Ct. 370, 380, 53 L. Ed. 530 (1909).

The very nature of plaintiff's medical history creates a serious question with respect to any causal connection between Agent Orange and his physical condition, *See, e.g.*, discussion of lack of causation in *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223,

1260-63 (E.D.N.Y. 1985) dismissal of claims of veterans who opted out of class). Given those initial doubts, plaintiff's refusal to comply with the reasonable orders of the Magistrate constitutes a gross form of spoliation, warranting an inference of lack of substance to the claim.

Plaintiff contends that his failure to obey is not willful but instead results from his poor health and therefore does not warrant a severe sanction. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 357 U.S. 197, 212, 78 S. Ct. 1087, 1096, 2 L. Ed. 2d 1255 (1958); *Flaks v. Koegel,* 504 F.2d 702, 708-09 (2d Cir. 1974). He has failed, however, to produce any believable evidence or raise any serious issue regarding Dr. Spagnolo's diagnosis and examination. The court concurs with the Magistrate's finding that the plaintiff's claim of ill health is untrue and is an excuse to prevent being embarrassed by a searching deposition. *See Weisberg v. Webster,* 749 F.2d 864, 871 (D.C. Cir. 1984). Plaintiff failed to offer any credible support for his argument when he had the opportunity before the Magistrate and this court. *Diaz v. Southern Drilling Corp.* 427 F.2d 1118, 1127 n. 4 (5th Cir.), *cert. denied,* 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970); *Mohamed v. American Export Lines,* 94 F.R.D. 327 (E.D.N.Y. 1982).

Ordinarily a single pretrial violation would not warrant dismissal. *United States Freight Co. v. Penn Central Transportation Co.,* 716 F.2d 954 (2d Cir. 1983). When, however, a party able to comply with a magistrate's order compelling discovery of an essential matter in his complaint fails to do so while understanding the full range of sanctions that may be marshalled against him, the court has little option but to dismiss his suit to safeguard the discovery process and the rights of other parties to the suit. *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747

(1976); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979). Plaintiff's obstinacy prejudices defendants by foreclosing them from discovering further information as a basis for their motion for summary judgment.

This court relies on the power of its Magistrates to control discovery informally with the cooperation of counsel and parties. *See* United States District Court for the Eastern District of New York, Standing Orders of the Court on Effective Discovery in Civil Cases *passim* (effective March 1, 1984); Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York (Wesely Committee), *id.* at 19 ff. The policy of the court, following the Wesely Committee and the bar's recommendations, is to use sanctions sparingly. *Id.* at 51-54. Yet ignoring a party's blatant attempt to frustrate discovery would weaken the system, denigrating the cooperative and forthcoming spirit among litigants that the Standing Orders are designed to encourage and foster. Here the Magistrate did everthing possible to obtain compliance with the Federal Rules of Civil Procedure and this court's Standing Orders, using the telephone conferencing methods the court encourages. *Id. passim*. The extreme sanction of dismissal must be applied.

C. *Summary Judgment*

Defendants have also moved to dismiss or for summary judgment on the grounds that plaintiff has failed to show (1) that he was ever exposed to Agent Orange, and (2) that Agent Orange caused the illnesses from which he is allegedly suffering. The legal standards governing these issues have already been described. *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. May 8, 1985). The facts in the instant case provide no basis for a finding of causality.

Even accepting Dr. Hogan's rather bizarre theory that he was exposed to Agent Orange through city dust and contact with his patients, there is no proof that the diseases and symptoms suffered by him were caused by Agent Orange.

The court has taken judicial notice of the dispositive nature of the epidemiological studies on the issue of lack of causation. *See In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1223 (E.D.N.Y. May 8, 1985). Defendants add support to this evidence with the testimony of three specialists, each of whom flatly denies any causation. Plaintiff's experts are equivocal, one of them referring to plaintiff's diseases as presenting a "mystery." None of plaintiff's experts show familiarity with the critical studies of Agent Orange. Plaintiff's expert testimony provides no basis upon which a trier of fact could rationally conclude that plaintiff's alleged injuries were more likely than not caused by Agent Orange. They would be excluded. *Id.*

IV. CONCLUSION

Were the case not dismissed under Rule 37, it would have to be dismissed under Rule 56. Dr. Hogan's claims are dismissed. This opinion constitutes a final judgment.

SO ORDERED.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

No. 1069, Docket 80-7079

United States Court of Appeals,
Second Circuit

Argued May 1, 1980.

Decided Nov. 24, 1980.

Thomas E. Moseley, John C. Sabetta and Leonard Rivkin, New York City (Cadwalader, Wickersham & Taft, Townley & Updike, New York City, Clark, Gagliardi & Miller, White Plains, N.Y., Kelley, Drye & Warren, New York City, and Rivkin, Leff & Sherman, Garden City, N.Y., on brief), for defendants-appellants.

Irving Like, Babylon, N.Y., and Victor John Yannacone, Jr., Patchogue, N.Y. (Edward F. Hayes, III and Malerba, Abruzzo, Clancy, Hayes, Downes & Frankel, Huntington, N.Y., Reilly & Like, Babylon, N.Y., W. Keith Kavenagh, Bayport, N.Y., Albert J. Fiorella, Mineola, N.Y., Yannacone & Yannacone, Patchogue, N.Y., Paul F. Corcoran, Mineola, N.Y., Aaron D. Twerski, Far Rockaway, N.Y., and Dorothy Thompson and Greenwald & Greenwald, Los Angeles, Cal., on brief), for plaintiffs-appellees.

Before FEINBERG, Chief Judge, and VAN GRAAFEILAND and KEARSE, Circuit Judges.

KEARSE, Circuit Judge:

This appeal presents the question whether claims asserted by veterans of the United States armed forces against com-

panies which supplied the United States government with chemicals that are alleged to have been contaminated and to have injured the veterans and their families, are governed by federal common law. Defendants-appellants Diamond Shamrock Corporation, Monsanto Company, Thompson-Hayward Chemical Company, Hercules Incorporated and the Dow Chemical Company were the manufacturers of various herbicides including "Agent Orange" (hereinafter collectively referred to as "Agent Orange") for use by the military as defoliants in the Vietnam War. The plaintiffs, veterans of that war and their families, allege that they have sustained various physical injuries by reason of the veterans' exposure to Agent Orange. Plaintiffs seek redress of those injuries under federal common law, and have invoked the "federal question" jurisdiction of the district court. 28 U.S.C. § 1331(a) (1976). Defendants contest the existence of a federal common law cause of action, and moved below to dismiss for lack of subject matter jurisdiction. The United States District Court for the Eastern District of New York, George C. Pratt, Judge, denied their motion. Defendants obtained certification of the jurisdiction issue and took this appeal pursuant to 28 U.S.C. § 1292(b) (1976).[1]

We agree with defendants that there is no federal common law right of action under the circumstances of this litigation. Accordingly, we reverse.

I

The present litigation began in late 1978 and early 1979, when several individual veterans and their families commenced actions in the Northern District of Illinois and the Southern and Eastern Districts of New York, claiming injury

[1] This Court granted defendants' motion for leave to appeal by order dated January 16, 1980.

from the veterans' exposure to Agent Orange and purporting to represent several classes of injured persons and persons allegedly "at risk" of injury. The plaintiffs in most of these actions were represented by the same attorney, who filed substantially identical complaints in all actions, naming the same defendant manufacturers. By order of the Judicial Panel on Multidistrict Litigation, thirteen such actions, involving thirty named plaintiffs, were transferred to the Eastern District of New York and assigned to Judge Pratt for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976). Subsequently, additional actions were filed and were transferred to the Eastern District. It appears that there are presently more than 800 named plaintiffs in these proceedings.

After the transfer plaintiffs filed an amended complaint in the action that the district court had designated as the lead action for purposes of pretrial proceedings. Defendants moved to dismiss on various grounds, and by opinion dated August 14, 1979, the district court dismissed a number of claims[2] and directed that a new complaint be filed. The second amended complaint was filed on August 20, 1979, asserting causes of action under the federal common law[3] and pre-

[2] These included a claim for injunctive relief against further manufacture of certain herbicides (which, the district court concluded, lay within the primary jurisdiction of the Environmental Protection Agency), as well as claims asserted under 42 U.S.C § 1983 (1976) and various provisions of the antitrust and trademark laws.

[3] Plaintiffs also sought to assert a cause of action under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 *et seq.* (1970) ("FIFRA"). The district court declined to infer such a cause of action for reasons we believe to be correct. *See* note 9 *infra*.

mising subject matter jurisdiction on 28 U.S.C. § 1331(a).[4] Defendants moved to dismiss for lack of subject matter jurisdiction. The motion was argued on October 3, 1979, and after argument but prior to decision plaintiffs proffered a third amended complaint. Defendants consented to the filing of the new complaint, and the district court, at the urging of the defendants, treated defendants' motion to dismiss as having been made with respect to that complaint. Accordingly, it is the third amended complaint (hereinafter sometimes referred to as the "Complaint") that is before us on this appeal.

A. *The Third Amended Complaint*

The basic thrust of the Complaint is relatively simple: defendants manufactured a "phenoxy herbicide," Agent Orange, for use by the military in Vietnam. The herbicide was allegedly contaminated with certain toxic organic chemicals, including 2,3,7,8–tetrachlorodibenzo-p-dioxin ("dioxin"), which plaintiffs describe as "one of the most toxic substances ever developed by man." (Plaintiffs' Brief on Appeal at 2.) The plaintiff veterans assert that they were exposed to Agent Orange, and thus to the dioxin it contained, while serving in Vietnam. They claim to have sustained various physical injuries, or to be "at risk" of such injuries, by reason of that exposure. Plaintiffs seek relief on a number of

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[4] 28 U.S.C. § 1331(a) provides in part as follows:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States
>
> . . . .

A cause of action which is founded on federal common law "arises under" the laws of the United States within the meaning of § 1331(a). *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100, 92 S.Ct. 1385, 1390–91, 31 L.Ed.2d 712 (1972); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968).

theories, including strict product liability, negligence, and breach of warranty.

What marks these proceedings as somewhat extraordinary are the size of the plaintiff class and the scope of the relief that is sought. Plaintiffs purport to represent the 2.4 million veterans who served as combat soldiers in Southeast Asia from 1962 through 1971, as well as most of the families or survivors of those veterans. Fifteen plaintiff subclasses are identified; many of these subclasses consist of persons who are "at risk" of, but have yet to sustain, various physical injuries. Plaintiffs have alleged that "the combined liquid assets of the 'corporate defendants' will be insufficient to fully compensate the entire class of plaintiffs." (Complaint ¶ 15.) Plaintiffs therefore seek, in addition to unspecified damages,[5] a decree requiring defendants, upon a determination of liability, to establish

> a trust fund out of the current earnings of the defendants in the nature of a reserve against the claims of all the individual members of the plaintiff class to insure that the compensation of any group of individual plaintiffs will not impair the rights of those not before the Court at that time.

(Complaint ¶ 9.) Plaintiffs also seek a permanent injunction against further manufacture of Agent Orange.

Defendants deny that there is any causal connection between exposure to Agent Orange and the injuries that plaintiffs claim to have sustained, and vigorously contest the propriety of the various remedial measures that plaintiffs seek to impose on them. This case, however, is still at the pleading

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[5] The third amended complaint alleges no specific *ad damnum*. The second amended complaint, however, asserted damages "in the range of $4 billion to $40 billion."

stage, and for purposes of deciding the jurisdictional question before us, plaintiffs' factual allegations must be accepted as true.

B. *The Decision of the District Court*

Plaintiffs argue that federal common law should be applied to their claims principally because of the unique federal nature of the relationship between the soldier and his government, relying chiefly on *United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S.Ct. 1604, 1606, 91 L.Ed. 2067 (1947) ("Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces."). They contend that this interest brings the case within the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 574, 87 L.Ed. 838 (1943), which held that, in order to ensure uniformity and certainty, "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." Plaintiffs argue that the government similarly has an interest in having all of its veterans compensated by government contractors who manufactured or marketed Agent Orange, and that application of the respective state laws would impede recovery on a uniform basis.

The district court rejected the contention that *Clearfield Trust* stated the controlling principle, recognizing that the United States, a party to *Clearfield Trust*, is not party to the plaintiffs' claims here.[6] Rather, the court recognized that since the present action involves only private parties, the federal common law issue is controlled by the principles set

[6] We note that the defendants have impleaded the United States in the present action. It is clear, however, that the jurisdiction of the district court over the claims of the plaintiffs is not enhanced by third party complaints. *Cf. Louisville & Nashville RR. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

forth in *Miree v. DeKalb County,* 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966). After reviewing the latter decisions, the district court applied a three-factor test to determine whether federal common law governs plaintiffs' claims:

> (1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law.

Slip op. at 17.

With respect to the first factor, the district court recognized two principal federal interests that may be affected by the present lawsuits: the federal government's interest in its relations with members of the armed forces, and its interest in its relations with suppliers of war materiel. As to the government's interest in the welfare of its veterans, the court stated that:

> Soldiers serving in the armed forces are government charges, entitled to government protection. Torts committed by war contractors against soldiers in action constitute "harms inflicted" on the soldiers and "interference" with the relationship between soldiers and the government. Such harms and interferences implicate federal interests identified in [*United States v. Standard Oil, supra*].

Id. at 18. The court rejected defendants' contention that these interests were already protected by the Congressionally-

enacted scheme of veterans' benefits, 38 U.S.C. § 310 *et seq.* (1976),[7] opining that

> [t]he limited nature of compensation provided by 38 U.S.C. § 310 *et seq.* makes it an insufficient guardian of the rights at stake in this litigation, *viz.* the rights of soldiers to be protected from "harms inflicted by others" and to be compensated for harms already inflicted. The existence and extent of these contested rights necessarily are intertwined with the relationship between government and soldier and thereby implicate federal interests.

Slip op. at 18–19. Finally, the court reasoned that because of the large number of veterans claiming injury, and the large potential liability of the five defendants, the foregoing federal interests were "substantial" for purposes of the federal common law analysis:

> The estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability of the five war contractors ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands.

Id. at 20.

As to the government's interest in its relations with its military suppliers–the court referred to a number of "speculative" ways in which lawsuits such as the present ones might

[7] 38 U.S.C. §310 *et seq.*, entitled "Compensation for Service-Connected Disability or Death," establishes for veterans a basic entitlement to compensation from the government for injuries resulting from military service, and sets rates of compensation for specific types and degrees of disability. These provisions do not address issues of the liability of third parties to injured service personnel.

adversely affect that interest, pointing out that in response to any increase in their potential liability, military suppliers might raise their prices, attach conditions to the use of their products, or stop dealing with the government altogether.[8] The court concluded that

> government relations with war contractors might well be drastically altered by changes in the rules governing liability of war contractors to soldiers for injuries caused by inherently "dangerous" war materials.

Id. at 19–20.

Turning to the second part of its test, the court found that the federal interest it had identified would be adversely affected if the issues in these lawsuits were adjudicated under state law:

> Application of varying state laws would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all relevant respects, would be treated differently under different state laws.

Id. at 21.

Finally, as to the third part of its test, the court determined that application of federal common law would not have any significant adverse impact on state interests. While noting that "[t]ort claims are traditionally matters for state law, which has developed comprehensive substantive and pro-

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[8] The court also noted that if defendants are eventually held liable for massive damages awards, the resulting blow to their financial health could have serious repercussions in the national economy.

cedural rules to govern them," *Id.* at 22, the court distinguished the instant tort actions, finding that

> state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad.

Id. at 23. The court concluded:

> Because state law is no more or less developed as to such claims than federal common law, application of federal common law thereto would not significantly displace state law.

Id.

Having found substantial federal interests that would be adversely affected by application of state law to the instant claims, and having determined that there were no substantial state interests in having state law applied, the district court ruled that plaintiffs had stated valid causes of action under the federal common law.[9] The court therefore held that it had

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[9] The district court correctly determined that there is no private right of action under FIFRA, 7 U.S.C. § 135 *et seq.* (1970). The current statute is the result of two principal enactments. The original FIFRA, Pub.L.No.80– 104, 61 Stat. 163 (1947) (codified at 7 U.S.C. §§ 135–135K (1976)), and the Federal Environmental Pesticide Control Act ("1972 Act"), Pub.L.No.92–516, 86 Stat. 973 (1972) (codified at 7 U.S.C. §§ 136–136y (1976), which amended, and has now superseded, the original Act. *See* Pub.L.No.91–516 § 4(b), 86 Stat. 998 (1972). Following the four-pronged analysis set forth in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), we conclude that neither enactment gives rise to a private right of action.

The four factors to be considered under *Cort v. Ash* are (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted," (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," (3) whether a right of action would be "consistent with the underlying purposes of the legislative scheme," and (4) whether the cause of action

is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely, on federal law." *Id.* at 78, 95 S.Ct. at 2087.

As to the original FIFRA, which was in effect during the entire period that plaintiff veterans served in Vietnam, we see no essential satisfaction of any of the *Cort v. Ash* tests. First, there is no indication that the bill was enacted for the especial benefit of military men. It is clear that Congress's intent was to protect the public in general, with perhaps some special consideration for "agricultural producers and other users" of pesticides and rodenticides, *See* [1947] U.S. Code Cong. Serv. pp. 1200, 1202 (quoting the Report of the House of Representatives Committee on Agriculture). FIFRA makes no special mention of soldiers; and the House report, which states that the bill was considered by the United States Departments of Agriculture and the Interior, does not indicate that the bill was considered by any military or defense agency. *Id.* As to the second (and most important, *see Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980)) of the *Cort* factors, we see no clear indication of legislative intent to create a private remedy. Plaintiffs have cited no legislative history on this point, nor have they presented any detailed statutory analysis. The Act itself is primarily concerned with establishing an administrative scheme of labeling registration and enforcement; there are indications that Congress expected that scheme to be the exclusive means of enforcement. *See* [1947] U.S. Code Cong.Serv. *supra*, at 1202. We conclude that this factor cuts against the plaintiffs. The third *Cort* factor is of little assistance here. While a private right of action might enhance enforcement of the Act's substantive provisions to some extent, it would also increase the burden on manufacturers (without commensurately increasing protection of *injured* persons who can recover damages under state product liability law), something which the administrative scheme of registration was specifically intended to avoid. *See* [1947] U.S. Code Cong.Serv., *supra* at 1202. Finally, the fourth *Cort* factor cuts strongly against the plaintiffs. The area of product liability has been "traditionally relegated to state law," and this is no less true of the products regulated by the FIFRA. *See, e.g., Muncy v. Magnolia Chemical Co.*, 437 S.W.2d 15 (Tex.Civ.App.1968). Thus, we conclude that the district court was correct in ruling that there is no private right of action under the original FIFRA.

As to the 1972 Act, the unavailability of a private right of action is even clearer. We find no more positive indications in the first, third and fourth *Cort* factors. More importantly, we find a negative indication as to the second *Cort* factor, *i.e.* legislative intent, since Congress considered and explicity rejected amendments that would have authorized citizen

subject matter jurisdiction over the case, and denied defendants' motion to dismiss.[10] This appeal followed.

II

Both plaintiffs and defendants accept the three-part test that the district court applied to the federal common law

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suits to enforce the 1972 Act's prohibitions. *See People for Environmental Progress v. Leisz*, 373 F.Supp. 589, 592 (C.D.Cal.1974) (discussing legislative history); *see also Kelly v. Butz*, 404 F. supp. 925, 940 (W.D.Mich.1975). It is not for us to override that congressional determination.

[10] The court also denied defendants' motion to strike portions of the Complaint relating to plaintiffs' demand that defendants be required to establish a trust fund. The court premised the denial on its conclusion that

> defendants are not prejudiced by allowing these requests for relief to remain in the [Complaint], since defendants have no obligation to admit or deny plaintiffs' requests for relief, which therefore place no pleading burden on defendants.

at 24. In addition, it appears that the court declined to rule on a motion to strike portions of the Complaint relating to class members who have not yet been injured, but are said to be merely "at risk" of injury by reason of a veteran's exposure to Agent Orange. Defendants argue here, as they have in moving for reargument below, that the district court should have granted both motions to strike. We decline to reach these questions. The district court, in granting certification under § 1292(b) was primarily concerned with the question of subject matter jurisdiction; the certification mentions only that issue. While we are not restricted by the district court's limited certification, *see Bersch v. Drexel Firestone Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975), and may review the entire order of the court below, *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1974), we conclude that review now of the trust fund and "at risk" issues would be inappropriate. First, our ruling on subject matter jurisdiction may end the federal court litigation. (It is unclear whether any plaintiffs will seek to proceed on the basis of diversity jurisdiction.) More importantly, the district judge did not assess the merits of either motion to strike, and we note that he has reserved decision on defendants' motion for reargument of these question, pending decision of this Court on the question of jurisdiction. In all, we think the wiser course is for this Court not to pass on them at this time.

issue, and for purposes of discussion we accept that framework. But, focusing our consideration chiefly on the first factor of the test, *i.e.*, "the existence of a substantial federal interest in the outcome of the litigation," we disagree with the district court's analysis and conclude that the court gave insufficient weight to the Supreme Court's repeated admonition that

> [i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown* ....

Wallis v. Pan American Petroleum Corp., supra, 384 U.S. at 68, 86 S.Ct. at 1304, *quoted with emphasis in Miree v. DeKalb County, supra*, 433 U.S. at 31, 97 S.Ct. at 2494. Principally we reject the district court's conclusion that there is an identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules.[11]

In considering plaintiffs' contentions, it is essential to delineate precisely the relation of the United States to the claims here at issue. These claims are brought by former servicemen and their families against private manufacturers; they are not asserted by or against the United States, and they do not directly implicate the rights and duties of the United States. They are thus unlike the claims in *United States v. Standard Oil Co., supra*, in which the government brought suit to recover for its payments to a soldier injured as a result of the defendant's negligence, and *Clearfield Trust Co. v. United States, supra*, in which the government

[11] Since we conclude that there is not now an identifiable federal policy, we need not reach the second and third factors of the test and speculate as to how state law, if it were already developed, would affect the federal policy if it were identifiable—or vice versa.

brought suit to enforce its rights in commercial paper issued by it. In each of those cases the government was a party seeking to enforce its own asserted rights, and analysis reveals two federal concerns which are inherent in such cases. First, the government has an interest in having uniform rules govern its rights and obligations. Second, the government has a substantive interest in the contents of those uniform rules. The first interest prize uniformity for its own sake and is content-neutral; it does not dictate the substance of the federal common law rule to be applied. Thus, in *United States v. Standard Oil Co., supra,* the Court applied federal common law, recognizing the government's interest in uniformity, but refused to impose the liability argued for by the United States as the substance of that law.

The present litigation is fundamentally different from *Standard Oil* and *Clearfield Trust* with respect to both uniformity interest and substantive interest in the content of the rules to be applied. Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake.[12] *See e.g., Miree v. DeKalb Country, supra,* 433 U.S. at 28, 97 S.Ct. at 2493. The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating an

[12] *Compare Bank of America Nat'l Trust & Sav. Ass'n v. Parnell,* 352 U.S. 29, 32–34, 77 S.Ct. 119, 120–121, 1 L.Ed.2d 93 (1956), private litigation involving the issues of whether certain government bonds were "overdue" and whether the defendant had taken title to the bonds in good faith. The Court observed that the question of when a government bond is overdue is a matter of federal law, but held that question as to a party's good faith are left to local law.

overriding federal law. Indeed, even where a federal statutory program governs the rights of private litigants and Congress has left gaps to be filled by the courts, uniformity is not prized for its own sake. For example, in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 701–05, 86 S.Ct. 1107, 1110–1113, 16 L.Ed.2d 192 (1966), the Court dealt with a suit under § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976), to which federal common law applied. Yet in determining the timeliness of such suits, the Court ruled that the appropriate state statutes of limitations should apply, and refused to impose a uniform federal period of limitations:

> [T]imeliness ... is clearly a federal question, for in § 301 suits the applicable law is "federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972.... We are urged instead [of referring to state laws,] to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation.

383 U.S. at 701, 86 S.Ct. at 1110. Thus, the prospect of uniformity is insufficient reason to invoke federal common law in private litigation and if federal common law were invoked, it would not ensure uniformity since frequently that law takes its substance from local law.

The second fundamental difference between the present litigation and the *Clearfield Trust* type of case is that in the latter, the government's substantive interest in the litigation is essentially monothetic, in that it is concerned only with preserving the federal fisc, whereas here the government has two interests and here the two interests have been placed in sharp contrast with one another. Thus, the government has an

interest in the welfare of its veterans; they have given of themselves in the most fundamental way possible in the national interest. But the government also has an interest in the suppliers of its materiel imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure materiel without the exaction of significantly higher prices, or the attachement of onerous conditions, or the demand of indemnification or the like. As plaintiffs' counsel has observed, "this litigation will have a direct and lasting impact on the relationship between the federal government and war contractors ... and between the federal government and veterans." (Letter dated October 21, 1980, V.J. Yannacone, Jr. to A. D. Fusaro.) It is obvious that the government is interested. But unlike a simple uniformity interest, neither the government's interest in its veterans nor its interest in its suppliers is content-neutral. Each interest will be furthered only if the federal rule of law to be applied favors that particular group.

The extent to which either group *should* be favored, and its welfare deemed "paramount" (*see* dissent of Chief Judge Feinberg, *post*), is preeminently a policy determination of the sort reserved in the first instance for Congress. The welfare of veterans and that of military suppliers are clearly federal concerns which Congress should appropriately consider in setting policy for the governance of the nation, and it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the contractors, and thereby identify federal policy. Although Congress has turned its attention to the Agent Orange problem,[13] it has not determined what the federal policy is with

[13] Congress has directed the Administrator of Veterans' Affairs to design and conduct an epidemiological study of veterans who were exposed to Agent Orange, and to report periodically to Congress until the study is completed. *See* Pub.L.No.96–151, 96th Cong., 1st Sess. (1979); 38 U.S.C. § 219 note (Supp.1980).

respect to the reconciliation of these two competing interests. Thus, this case is unlike *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979), or *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968), in which the court was asked to supplement with federal common law a federal statutory program which itself embodied Congressional policy determinations.[14] In *Owens*, as Chief Judge Feinberg observes, *post*, the Court "discerned a 'federal regulatory scheme'" for the protection of prisoners. It is one thing to *discern* a federal regulatory scheme from the statutes Congress has enacted, as in *Owens*; it is another to *devise* such a scheme in the face of inaction by Congress. The dissent finds it anomalous that federal common law may apply to prisoners but not to veterans. We suggest that the anomaly lies not with the court in declining to devise a scheme, but with Congress which has made specific provision for protection of the government's prisoners but not for its soldiers.

We conclude that in the present case, while the federal government has obvious interests in the welfare of the parties to the litigation, its interest in the *outcome* of the litigation, *i.e.*, in how the parties' welfares should be balanced, is as yet undetermined.[15] The teaching of *Wallis* and *Miree* is that before federal common law rules should be fashioned, the

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[14] Plaintiffs contend that FIFRA (*see* note 9 *supra*) evinces a federal interest in regulation of herbicides sufficient to call into play the federal common law. But as this court has noted, FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates. *Chemical Specialties Mfrs. Ass'n v. Lowery*, 452 F.2d 431 (2d cir. 1971). It is certainly an insufficient basis for a displacement of the entire body of state product liability law.

[15] The large number of veterans claimed in the class does not reveal the content of a federal policy reconciling the competing interests, any more than does the possibility that the defendant companies would have to be liquidated to pay the claims of the class.

use of state law must pose a threat to an "identifiable" federal policy. *Wallis v. Pan American Petroleum Corp., supra,* 384 U.S. at 68, 86 S.Ct. at 1304; *Miree v. DeKalb County, supra,* 433 U.S. at 31–33, 97 S.Ct. at 2494, 2495. In the present litigation the federal policy is not yet identifiable. We conclude, therefore, that the district court erred in ruling that plaintiffs' claims were governed by federal common law. The order denying defendants' motion to dismiss for lack of subject matter jurisdiction is accordingly

Reversed.

FEINBERG, Chief Judge (dissenting):

This case presents us with a unique set of facts, parties, and pleadings. Many aspects of plaintiffs' case are troublesome, because plaintiffs seek unusual relief, both procedural and substantive, as to which I express no view. But the issue now before us is far narrower, and raises more familiar considerations. That issue is whether a federal district court has federal question jurisdiction over the action, see 28 U.S.C. § 1331(a), because the action arises under federal common law. I agree with District Judge Pratt that this case should be tried in federal court under rules of federal common law. I therefore dissent from the opinion of the majority.

That the present case is *sui generis,* and national in its proportions, is evident from the complaint itself. The defendants in this action are five of the largest chemical companies in the nation, all of which admittedly manufactured "Agent Orange," a defoliant, for use by our nation's armed forces in Vietnam between 1962 and 1971. Plaintiffs' suit is brought on behalf of veterans, living and dead, and their parents, wives, widows, orphans, and children, living, dead, and stillborn. Plaintiffs allege that the Agent Orange supplied by the defendants was "contaminated with ... polychlorinated dibenzo–p–dioxins ... and polychlorinated dibenzo furans ...

including 2,3,7,8,–tetra–chloro dibenzo p–dioxin (... "Dioxin"), one of the most toxic substances ever developed by man." Plaintiffs further allege that as a result of exposure to Agent Orange, they incurred, or have suffered an increased risk of incurring, cancer, genetic damage, and an early death. Judge Pratt noted that the defendants are "facing aggregate claims which may eventually amount to billions of dollars." As the majority notes, the complaint identifies fifteen groups of plaintiffs, totalling over 800 plaintiffs who, we are told, have filed complaints in 25 judicial districts all across the country. By this time it is probable that 30 to 40 districts are affected, since additional plaintiffs appear daily; plaintiffs' counsel assures us that many more complaints would already have been filed, but for the request of Judge Pratt not to do so until the question of class certification has been resolved. How many plaintiffs will ultimately come forward is unclear. Present plaintiffs assert that as many as 2,400,000 men and women who served in the armed forces could be eligible to sue defendants—not to mention their parents, dependents, and dead or stillborn children. The national dimensions of the case as pleaded are too obvious to escape notice. Identical complaints have been filed, *inter alia*, in Massachusetts and California, in Illinois and Texas, and we are informed that the Judicial Panel on Multidistrict Litigation has ordered all Agent Orange cases consolidated before Judge Pratt. The plaintiffs in these cases complain of injuries sustained as the result of service in our nation's military, in a national endeavor in a foreign land. To the non-legal mind, it would be an odd proposition indeed that this litigation, so patently of national scope and concern, should not be tried in federal court.

As for the legal mind, all involved in this case—the parties, Judge Pratt, and the panel on appeal—appear to agree that federal question jurisdiction depends upon whether a fed-

eral common law rule of product liability should be applied. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 98–101, 92 S.Ct. 1385, 1390–1391, 31 L.Ed.2d 712 (1972); *Ivy Broadcasting Company v. American Telephone and Telegraph Company*, 391 F.2d 486, 492–93 (2d Cir. 1968). Whether a federal rule should be applied, in turn, depends on three factors, as discerned in *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), and *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966):

> (1) the existence of a substantial federal interest in the outcome of the litigation;
>
> (2) the effect on this federal interest should state law be applied; and
>
> (3) the effect on state interests should state law be displaced by federal common law.

Judge Pratt, in his thorough and able opinion, analyzed all these factors and concluded that the fashioning of a federal common law rule was warranted on the facts of the present case. In a closely analogous case, *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979), this court recently arrived at the same result. *Owens* is instructive because it represents the most recent examination by this court of the "federal interest" doctrine discussed in *Miree* and *Wallis*. A review of the *Owens* facts and holding shows that Judge Pratt's analysis of the factors set forth above was correct.

In *Owens*, plaintiff was a federal prisoner who was injured by country jail officials who were working under contract with the federal government. Plaintiff sued for damages as, *inter alia*, a third-party beneficiary of that contract. On that theory, the "first question" before this court was whether plaintiff's claims were "a matter of federal law or of state

law"; the question was posed "both as a guide to contract interpretation and as an alternate basis for jurisdiction in the district court." 601 F.2d at 1248. Writing for the panel, the late Judge Smith noted that "the federal government owes a duty of reasonable care to safeguard the security of prisoners under its control," and discerned a "federal regulatory scheme" for maintaining the health and well-being of such prisoners. *Id.* at 1249. Judge Smith then concluded that this regulatory scheme generated "a federal interest in assuring uniform treatment of federal prisons," *id.*, and that that interest, combined with the government's duty of reasonable care, meant that "federal rights and obligations [did] 'hinge on the outcome' of litigation in this area," *id.* at 1249–50. As a result, the court held that federal common law should apply.

Looking, as the *Owens* court did, to *Miree* and *Wallis*, the first question we must answer is whether the federal government has a "substantial interest" in the outcome of this litigation. It is plain that this question must be answered affirmatively. As the Supreme Court observed in *United States v. Standard Oil Company*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947),

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or non-federal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and

> governed by federal authority. See *Tarble's Case*, 80 U.S. 397, 13 Wall. 397, 20 L.Ed. 587; *Kurtz v. Moffitt*, 115 U.S. 487, 6 S.Ct. 148, 29 L.Ed. 458. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

Id. 332 U.S. at 305–06, 67 S.Ct. at 1606–1607 (footnotes omitted). This obviously federal relationship does not depend primarily upon any particular statute, but rather inheres in the federal government's exclusive capacity to wage war. But in the case before us this relationship can also be analyzed in terms of *Owens*. In *Owens*, the federal government was found to owe "a duty of reasonable care" to federal prisoners, a duty stemming from statutory enactment, specifically 18 U.S.C. § 4042.[1] Similarly, the federal government here is under a statutory obligation to provide "an improved and uniform program of medical ... care for members [of the uniformed services] and certain former members of those services, and for their dependents." 10 U.S.C. § 1071. Further, in *Owens* this court discerned in "the scheme of regulation of federal prisons [an indication of] congressional intent to provide some general protections for federal prisons." 601 F.2d at 1249. Similarly, in the present case there is a statutory scheme to provide "general protections" for members and

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[1] 18 U.S.C. § 4042 provides, in pertinent part, that the "Bureau of Prisons . . . shall . . . provide for the safekeeping, care, . . . subsistence, . . . [and] protection . . of all persons charged with or convicted of offenses against the United States . . .."

veterans of the uniformed services. See 10 U.S.C. §§ 1071–87 (program of medical care for members of uniformed services and dependents); 38 U.S.C. §§ 310-15 (schedule of compensation to veterans and dependents for wartime disabilities); §§ 321–22 (schedule of compensation to survivors of veterans for wartime death); §§ 331–35 (same, peacetime disabilities); §§ 341–42 (same, peacetime death); 50 U.S.C.App. § 454(a) (requiring adequate provision of shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations before persons can be inducted into military service). See also the various regulations governing the welfare of soldiers, all of which are, of course, promulgated under authority granted by Congress. 10 U.S.C. § 121 (President's power to prescribe regulations); § 3012(g) Secretary of Army's power to prescribe regulations).[2] The Secretary of the Army is required by statute to be responsible for the "welfare, preparedness, and effectiveness of the Army." 10 U.S.C. § 3012(b)(1).

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[2] E.G., Army Regulations 40–2, Army Medical Treatment Facilities, General Administration (effective April 1, 1978) (requiring provision of highest quality of patient care to soldiers in Army medical facilities); Army Regulation 40–3, Medical, Dental, and Veterinary Care (effective December 1, 1977) providing standards of policy, eligibility, treatment, and administration, inter alia, in Army medical facilities); Army Regulation 32–15, Clothing and Textile Materiel, Classification and Inspection (effective October 1, 1976) (providing minimal standards for serviceability of clothing of Army personnel); Army Regulation 210–16, Bachelor Housing Management (effective September 15, 1975) (providing minimal standards of adequacy for quarters of certain Army personnel); Army Regulation 30–1, Army Food Service Program (effective July 1, 1977) (providing standards for food and food services for Army personnel); Army Regulation 28–1, Army Morale Support Activities (effective February 15, 1979) (providing programs for maintenance of morale, esprit, mental and physical fitness, and combat readiness of Army personnel.)

The majority concludes that on the facts of this case "there is no federal interest in uniformity for its own sake," and that there is no federal "substantive interest in the content of the rules to be applied." I disagree on both counts. As to uniformity of treatment, this court noted in *Owens* that "[b]ecause there is a federal regulatory scheme, there is a federal interest in assuring uniform treatment of federal prisoners." 601 F.2d at 1249. It is anomalous for this court to hold, on the one hand, that the federal government has an interest in "uniform treatment" of its *prisoners* sufficient to warrant the use of a federal rule of recovery, and, on the other hand, that the federal government has no such interest in "uniform treatment" of its *soldiers*. The majority suggests that the anomaly here lies "with Congress, which has made specific provisions for the protection of the government's prisoners but not for its soldiers." But a review of the statutory and regulatory provisions cited above, especially 10 U.S.C. §§ 1071–87 (medical care), § 3012(b)(1) (Secretary of Army's responsibility for "welfare" of Army personnel), and 38 U.S.C. §§ 310–15, 321–22, 331–35, 341–42 (veterans' and survivors' compensation), as well as myriad, detailed Army Regulations, demonstrates beyond doubt that Congress has made specific provisions for the protection of its soldiers, both directly and by delegation.

The majority also concludes that because the government has arguably conflicting substantive interests in the outcome of the litigation, "the federal policy is not yet identifiable." The allegedly conflicting federal interests are in the welfare of veterans and in the welfare of suppliers of war materiel. But that the plaintiff veterans and the defendant contractors have opposing interests in this litigation hardly means that the paramount federal interest is somehow divided or self-contradictory. The United States has a clear interest in the protection of its soldiers from harm caused by defective war

materiel. What other interests does the United States arguably have that might conflict with this clear interest? One such interest might be in seeing that defendants, as suppliers of war materiel, are treated fairly. But that interest cannot be said to conflict with the government's interest in the safety of its soldiers. Another such interest might be in preventing defendants from being driven to bankruptcy by large damage awards to Agent Orange plaintiffs, who have already made claims assertedly greater than defendants' combined liquid assets. This, I take it, is what the majority means by its reference to the federal interest in the "welfare" of defendants. But this interest lies in the future, and in the realm of speculation. There will be time enough to deal with the potential impact of defendants' financial liability if and when they incur any, if it is truly in the interest of the United States to do so. By contrast, plaintiffs' injuries—assuming for the moment that plaintiffs have a viable cause of action—lie in large part in the present, and in the realm of the concrete. The conclusion seems inescapable to me that the United States' interest in the "welfare" of defendants cannot approach, either in magnitude or in quality, its interest in the welfare of the Agent Orange plaintiffs. In short, in the case before us the paramount interests of the United States are in the welfare of its veterans and in their fair and uniform treatment.

Having discerned a signficant federal interest, we are next required to determine whether or not a "significant conflict" exists between that interest and the application of state law. This factor is not reached by the majority. But that such a conflict does exist in the represent case can hardly be disputed. Given the "distinctively federal" character of the relationship between the federal government and its soldiers, there is an inherent federal interest in the uniform definition of the aspects of that relationship involved in this case. As

noted earlier, this inherent interest in uniformity was observed by this court in *Owens*, 601 F.2d at 1249. The application of state law to the present case would severely frustrate this federal interest: If state law is applied in the present litigation, and assuming again that the allegations in the complaint are true, then veterans may well be subjected to sharply differing rules of law in the pursuit of their remedies. For example, the law of the various states is in flux, diverging widely in the definition of what constitutes a "defective" product—especially with respect to defectively designed products—and in the availability of defenses based on the "state of the art" and technological feasibility. See United States Department of Commerce, Interagency Task Force on Product Liability, Product Liability: Final Report II–6–10 (1977) (varying state law respecting "defectiveness," especially in design—defect cases); *id.* at II–11–12 (same, respecting defense of "state of the art"). As a result, if the laws of 30 or 40 state jurisdictions are separately applied, veterans' recoveries from Agent Orange injuries will vary widely—despite the fact that these soldiers fought shoulder to shoulder, without regard to state citizenship, in a national endeavor abroad. In sum, the federal interest here in uniformity would be defeated by the application of discrete and differing state laws. It is thus not necessary to reach the question whether the other federal interest present in this case—in seeing that soldiers are not harmed by defective war materiel—would be frustrated by the application of state law. Because the federal interest in uniformity would be defeated by such an application, I conclude that the first two requirements of *Miree* and *Wallis*, as interpreted by this court in *Owens*, are satisfied, as Judge Pratt concluded.

The third and last factor involves the extent to which state interests would be affected, if state law were to be "displaced" by federal common law in the present case. This fac-

tor is also not reached by the majority. I agree with Judge Pratt's conclusion that the claims made by plaintiffs in this unique and unprecedented litigation do not fall within the developed area of state tort law. As noted above, the states' product liability law is in flux; with respect to a case as novel as the one before us, a consistent and established body of state law is even less discernible. Accordingly, I think that Judge Pratt was correct in holding that the application of federal common law to the case before us would not "displace" state law, because there is no substantial body of state law on this point to be displaced. I thus conclude that all three factors, accepted by the majority as the proper analytical framework, point to the use of a federal common law rule in the present case, giving rise to federal question jurisdiction.

Because I conclude that the district court does have jurisdiction over the case before us, I dissent from the opinion of the majority.

In re DIAMOND SHAMROCK CHEMICALS COMPANY, the Dow Chemical Company, Monsanto Company, Hercules Incorporated, and T H Agriculture & Nutrition Company, Inc., Petitioners,

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

No. 754, Docket 83–3065.

United States Court of Appeals,
Second Circuit.

Argued Jan. 4, 1984.

Decided Jan. 9, 1984.

Certiorari Denied Feb. 27, 1984.
See 104 S.Ct. 1417.

Wendall B. Alcorn, Jr., Cadwalader, Wickersham & Taft, New York City, for petitioners.

David John Dean, Carle Place, N.Y., Stephen J. Schlegal, Chicago, Ill., Benton Musslewhite and Thomas Henderson, Plaintiffs' Management Committee, Houston, Tex., Irving Like, Chairman, Law Committee, Babylon, N.Y., for respondents.

Before NEWMAN and WINTER, Circuit Judges, and MacMAHON, District Judge.*

WINTER, Circuit Judge:

This multi-district litigation in the Eastern District of New York involves several hundred actions brought by veterans of the armed forces of the United States, Australia and New

*Hon. Lloyd F. MacMahon, of the United States District Court for the Southern District of New York, sitting by designation.

Zealand who served in Vietnam at some time during the period 1961 to 1972 and by their spouses, parents and children. Jurisdiction is based upon diversity of citizenship. *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir.1980), *cert. denied,* 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). The plaintiffs claim to have suffered damages as a result of the veterans' exposure to "Agent Orange," a term applied to a group of similar herbicides containing toxic substances used by United States armed forces in Vietnam. The defendant chemical companies allegedly produced Agent Orange with unsafe levels of the chemical byproduct commonly called dioxin. Plaintiffs' theories of liability include negligence, strict liability, breach of implied warranty, intentional tort and nuisance. They seek compensatory and punitive damages.

On December 16, 1983, Chief Judge Weinstein certified two classes, one pursuant to Fed.R.Civ.P. 23(b)(3) and the other pursuant to Rule 23(b)(1)(B). *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983). Familiarity with his Memorandum and Order is assumed. This pettiion for a writ of mandamus ensued. We deny the petition.

We note again that mandamus is an extraordinary remedy. Thus, "mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ." *United States v. DeStefano,* 464 F.2d 845, 850 (2d Cir.1972). We note also that this action is "*sui generis*, and national in its proportions" involving an extraordinary constellation of facts, parties and pleadings. *In re Agent Orange Product Liability Litigation, supra* at 995. (Feinberg, C.J., dissenting). Accordingly, it is not a case where mandamus is particularly appropriate because a district court's action is likely to "encourage the use of similar procedures by ... dis-

trict courts in the future." *United States v. Dooling*, 406 F.2d 192, 199 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969).

Chief Judge Weinstein certified a class under Fed. R.Civ.P. 23(b)(3)[1] of United States, Australian and New Zealand veterans, allegedly injured in Vietnam by Agent Orange, and various members of their families, on the grounds that common issues of law and fact predominated. Specifically, he identified as common issues general causation, failure to warn and affirmative defenses arising out of allegations concerning misuse by the government and federal contract requirements.

The oral argument before us cast considerable doubt upon the significance—not to say existence—of the issue of general causation. As described by plaintiffs' counsel, the issue is limited to whether the many harms alleged could conceivably have been caused by Agent Orange without regard to, or

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[1] Rule 23(b)(3) provides:

> (b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
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> (A) the interest of members of the class in individually controlling the prosecution of defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

differentiation among, levels of exposure. Defendants' response that anything, even water, can be harmful, would seem to dispose of the issue, so defined, without more. However, our skepticism on this particular score, which may be alleviated by framing the issue in different terms, hardly calls for issuance of the writ since it is clear that common issues relating to the nature of the hazards caused by Agent Orange are directly involved in the parties' various contentions regarding an alleged failure to warn, the defense of misuse and the so-called government contract defense. Plaintiffs' claim that defendants conspired to conceal the dangers of Agent Orange also raises a common issue of fact.

Common issues of fact of considerable significance thus arguably exist. Potentially these include what each manufacturer knew and when he knew it, what each told the government and when it did so, what the government learned on its own and when it did so, what hazards of Agent Orange were known then and are known now, what influence the government exercised over the composition of the herbicide, and what various manufacturers communicated to each other. It is, of course, true that many issues are peculiar to the individual plaintiffs, such as the nature of the exposure to the herbicide, causation of individual ailments, and monetary damages. Whether further subclasses may be possible must be left to the future although it is clear that the residual individual trials will be a considerable task. Nevertheless, it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely. Moreover, since these issues may involve extensive documentary and testimonial evidence, Chief Judge Weinstein found that obviating a retrial in

countless individual cases will lead to substantial economies in the use of judicial and private resources.

There are thus substantial grounds at this stage to support his conclusion that the common issues predominate and that a class action is the most efficient means of adjudicating them. Moreover, there is no guarantee that a non-class action decision on the common issues favorable either to a plaintiff or to the defendants will be recognized as dispositive in later cases under the doctrine of collateral estoppel as applied in different states. *See, e.g., Standage Ventures, Inc. v. State,* 114 Ariz. 480, 562 P.2d 360 (1977) (reaffirming mutuality requirement despite trend toward abolishing it); *Howell v. Vito's Trucking and Excavating Co.,* 386 Mich. 37, 191 N.W.2d 313 (1971) (same). The unique common issues take the case out of the general rule that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Advisory Committee Note to the 1966 Revision of Rule 23(b)(3), *reprinted in 39* F.R.D. 69, 103 (1966). *See In re Northern District of California "Dalkon Shield" IUD Product Liability Litigation,* 693 F.2d 847 (9th Cir. 1982), *cert. denied,* ____ U.S. ____, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *Payton v. Abbott Labs,* 100 F.R.D. 336 (D.Mass. 1983); *Delaney v. Borden, Inc.,* 99 F.R.D. 44 (E.D.Pa. 1983); *Mertens v. Abbott Laboratories,* 99 F.R.D. 38 (D.N.H. 1983); *Thompson v. Procter & Gamble Co.,* No. C-80-3711, slip op., (N.D. Cal. Dec. 7, 1982); *Ryan v. Eli Lilly & Co.,* 84 F.R.D. 230 (D.S.C. 1979); *McDaniel v. Johns-Manville Sales Corp.,* No.76-735, slip op., (N.D. Ill. May 31, 1979); *Marchesi v. Eastern Airlines, Inc.,* 68 F.R.D. 500 (E.D. N.Y. 1975).

Chief Judge Weinstein also found that the divergence among states as to choice of law and product liability rules is insignificant and that "a consensus among the states ... provides, in effect, *a national substantive rule governing the main issues in* this case." It is, of course, the law of this case that plaintiffs' claims arise under state law *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981),[2] and it is possible that the law of every state and Australia and New Zealand, including choice of law rules, will at some point come into play. While we will not disclaim considerable skepticism as to the existence of a "national substantive rule," we note Chief Judge Weinstein's declared intention to create subclasses as dictated by variations in state law. Given the unique aspects of this case arguably creating a need for a single dispositive trial on the common issues described above, we cannot say that the use of subclasses corresponding to variations in state law is a palpable error remediable by mandamus.

Chief Judge Weinstein also certified a mandatory class under Rule 23(b)(1)(B).[3] Relying upon findings of a Special

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[2] That case did not decide whether potential defenses implicating federal interests such as the government contract defense would be governed by federal or state law.

[3] Rule 23(b)(1)(B) provides:

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> * * * * * *
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Master, he found that the defendants' assets are at this time sufficient to meet a judgment for compensatory damages. He reasoned, however, that because punitive damages are designed solely to punish rather than to compensate, courts adjudicating later individual claims would admit evidence as to the payment of punitive damages in prior cases. Since this might induce juries to reduce punitive awards to later claimants, he found that an "adjudication with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." He then certified a class under Rule 23(b)(1)(B) for the award of punitive damages. Given the large number of potential claimants, estimated by the Special Master to be over 40,000 and given the fact that punitive damages ought in theory to be distributed among the individual plaintiffs on a basis other than date of trial, the argument against his ruling does not justify issuance of a writ of mandamus.[4]

Petitioners also attack Chief Judge Weinstein's provisions for notice to the class, which include written notice to all plaintiffs and intervenors in actions brought in federal courts and to all persons currently listed on the Veterans Administration's "Agent Orange Registry." Provision is also made for requests to radio and television networks and stations to broadcast notice, as well as notice by advertising in a number of newspapers and magazines. Notice is also to be given to the governors of each state who will be requested to notify any state organizations dealing with the problems of Vietnam veternas and then to notify Vietnam veterans identified by such organizations who may be a member of the class.

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[4] Subclasses may be necessary here because of variations in state law governing the award of punitive damages.

Chief Judge Weinstein found this to be the best notice practicable under the circumstances, a conclusion which, if not inexorable, is arguably correct, at least before the full results of the advertising and notice to the governors are known.

Review of the many issues raised by the class certification will be available when the ramifications of each aspect of the ruling will be evident. We decide only that the petition for mandamus is denied.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION MDL NO. 381

Nos. 1140, 1141, 1097, 1139, 1081, 1134, 1135, 1100, 1101, 1098, 1099, 1105, 1106, 1102, 1103, 1115, 1119, 1136, 1122, 1123 1124, 1130, 1133, 1127, 1129, Docket Nos. 84-6273, 84-6321, 85-6035, 85-6051, 85-6083, 85-6261, 85-6265, 85-6301, 86-6303, 85-6307, 86-6323, 86-6325, 86-6327, 86-6329, 85-6335, 85-6349, 85-6371, 85-6373, 85-6379, 85-6381, 85-6385, 85-6387, 85-6393, 85-6395, 85-6411

United States Court of Appeals,
Second Circuit.

Argued April 9, 1986.

Decided April 21, 1987.

Sherman L. Cohn, Robert A. Taylor, Jr., Washington, D.C.; Richard L. Steagall, Peoria, Ill.; Benton Musslewhite, Houston, Tex., Avram G. Adler, Francis Kelly, Philadelphia, Pa. (Ashcraft & Gerel, Washington, D.C.; Nicoara & Steagall, Peoria, Ill.; Adler & Kops, Philadelphia, Pa.; James H. Brannon, Jamison & Brannon, Houston, Tex.; Joel Rome, Rome & Glaberson, Philadelphia, Pa.; Marlene Penny Maynes, Cincinnati, Ohio; Richard D. Heidemen, Louisville, Ky.; Stephen L. Toney, Werner, Beyer, Lindgren & Toney, New London, Wis.; Richard Ellison, Cincinnati, Ohio; James C. Barber, Dallas, Tex.; William Beatty, Granite City, Ill; John T. McKnight, Brunswick, Ga.; Richard L. Gill, Gill & Brinkman, St. Paul, Minn.; James H. Davis, Los Angeles, Cal.; Kenneth R. Yoffey, Newport News, Va.; Richard L. Powell, Augusta, Ga.; Joseph H. Latchum, Jr., Watkins,

Chase, Latchum & Williams, Hampton, Va.; Lula Abdul-Rahim, Duda, Rahim & Rotto, Oakland, Cal.; Robert D. Gary, Gary & Duff, Lorain, Ohio; J. Edward Allen, Forston, Bentley & Griffin, Athens, Ga.; Charles O. Fisher, Walsh & Fisher, Westminster, Md.; William J. Risner, Tucson Ariz.; Walter L. Blair, Blair & Starks, Charles Town, W.Va.; Janet Frazier Phillips, Las Vegas, Nev.; Russell Smith, Laybourne, Smith, Gore, Akron, Ohio; H. Muldrow Etheredge, New Orleans, La.; Ford S. Reiche, Barrett, Reiche & Sheehan, Portland, Me.; Sara Hayes, Gage & Tucker, Kansas City, Mo.; William Jorden, Jorden & White, Meadville, Pa.; Eugene P. Cicardo, Alexandria, La.; Carry R. Dettloff, Kistner, Schienke, Staugaard, Warren, Michigan; James H. Bjorum, Cox, Dodson & Bjorum, Corpus Christi, Tex.; Jack E. London, Hollywood, Fla.; James T. Davis, Davis & Davis, Uniontown, Pa.; Robert W. Kagler, Moundsville, W.Va.; Michael Radbill, Philadelphia, Pa.; William T. Robinson, III, Robinson, Arnzen, Parry, Covington, Ky.; William Jarblum, Jarblum & Solomon, New York City; John R. Mitchell, Charleston, W.Va.; Dennis A. Koltun, Miami, Fla., of counsel), for plaintiffs-appellants objectors to the class settlement.

John C. Sabetta, Townley & Updike, New York City for appellee Monsanto Co.

George D. Reycraft, Cadwalader, Wickersham & Taft, New York City, for appellee Diamond Shamrock Chemicals Co.

Rivkin, Radler, Dunne & Bayh, Garden City, N.Y., for appellee The Dow Chemical Co.

Kelley Drye & Warren, New York City, for appellee Hercules Inc.

Clark, Gagliardi & Miller, White Plains, N.Y., for appellee TH Agriculture & Nutrition Co., Inc.

Shea & Gould, New York City, for appellee Uniroyal, Inc.

Budd Larner Kent Gross Picillo Rosenbaum Greenberg & Sade, Short Hills, N.J., for appellee Thompson Chemicals Corp.

Lawrence G. Sager, New York City; Stephen J. Schlegel, Chicago, Ill. (Irving Like, Reilly, Like & Scheneider, Babylon, N.Y.; Edward F. Hayes, III, Abruzzo, Clancy & Hayes, Huntington, N.Y.; Clayton P. Gillette, Boston, Mass.; Thomas W. Henderson, Henderson & Goldberg, Pittsburgh, Pa.; David J. Dean, Dean, Falanga & Rose, Carle Place, N.Y.; Gene Locks, Greitzer & Locks, Philadelphia, Pa.; Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio; Newton B. Schwartz, Houston, Tex.; Phillip E. Brown, Hoberg, Finger, Brown, Cox & Molligan, San Francisco, Cal.; John O.Quinn, O'Quinn & Hagans, Houston, Tex., of counsel), for appellee plaintiffs; Management Committee.

Before VAN GRAAFEILAND, WINTER, and MINER, Circuit Judges.

WINTER, Circuit Judge:

This is the first of nine opinions, all filed on this date, dealing with appeals from Judge Pratt's and Chief Judge Weinstein's various decisions in this multidistrict litigation and class action. This opinion begins with a section entitled "Overview and Summary of Rulings" that summarizes the entire case and all of our decisions. The next section, "Detailed History of Proceedings," gives the background for all of the appeals. Familiarity with this section may be necessary to understand the various opinions that follow. The present opinion also contains our rulings regarding the certification of a class action and the approval of the settlement between the plaintiff class and the defendant

chemical companies. Two other opinions by this author review the propriety of the distribution scheme for the resultant fund and the grant of summary judgment against those plaintiffs who opted out of the class action. Three opinions by Judge Van Graafeiland resolve issues concerning the liability of the United States to veterans, their families, and the chemical companies. A fourth opinion by Judge Van Graafeiland reviews the dismissal of actions brought by civilian plaintiffs against the United States and the chemical companies. Two opinions by Judge Miner resolve issues concerning the validity of a fee agreement among the members of the Plaintiffs' Management Committee ("PMC") and the district court's award of attorneys' fees.

Most of the appeals in this litigation were argued on April 9-10, 1986. The appeal from the adoption of the distribution scheme, however, was not taken until August 19, 1986 and was not argued until October 1. Because the issues raised by the latter appeal were in many ways interrelated with those argued in April, the panel had to suspend consideration of these matters until it heard the arguments in October.

I. OVERVIEW AND SUMMARY OF RULINGS

By any measure, this is an extraordinary piece of litigation. It concerns the liability of several major chemical companies and the United States government for injuries to members of the United States, Australian, and New Zealand armed forces and their families. These injuries were allegedly suffered as a result of the servicepersons' exposure to the herbicide Agent Orange while in Vietnam.

Agent Orange, which contains trace elements of the toxic by-product dioxin, was purchased by the United

States government from the chemical companies and sprayed on various areas in South Vietnam on orders of United States Military commanders. The spraying generally was intended to defoliate areas in order to reduce the military advantage afforded enemy forces by the jungle and to destroy enemy food supplies.

We are a court of law, and we must address and decide the issues raised as legal issues. We do take note, however, of the nationwide interest in this litigation and the strong emotions these proceedings have generated among Vietnam veterans and their families. The correspondence to the court, the extensive hearings held throughout the nation by the district court concerning the class settlement with the chemical companies, and even the arguments of counsel amply demonstrate that this litigation is viewed by many as something more than an action for damages for personal injuries. To some, it is a method of public protest at perceived national indifference to Vietnam veterans; to others, and organizational rallying point for those veterans. Thus, although the precise legal claims is one for damages for personal injuries, the district court accurately noted that the plaintiffs were also seeking "larger remedies and emotional compensation" that were beyond its power to award. *In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 747 (E.D.N.Y. 1984).

Central to the litigation are the many Vietnam veterans and their families who have encountered grievous medical problems. It is human nature for persons who have cancer in themselves or serious birth effects in their children to search for the causes of these personal tragedies. Well-publicized allegations about Agent Orange have led many such veterans and their families to believe that the herbicide is the source of their current grief. That grief is hardly assauged by the fact that contact with the herbicide

occurred while they were serving their country in circumstances that were unpleasant at best, excruciating at worst.

When the case is viewed as a legal action for personal injury sounding in tort, however – and we are bound by our oaths to so view it – the most noticeable fact is the pervasive factual and legal doubt that surrounds the plaintiffs' claims. Indeed, the clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings. Epidemiological studies of Vietnam veterans, many of which were undertaken by the United States, Australian and various state governments demonstrate no greater incidence of relevant ailments among veterans or their families than among any other group. To an individual plaintiff, a serious ailment will seem highly unusual. For example, the very existence of a birth defect may persuade grieving parents as to Agent Orange's guilt. However, a trier of fact must confront the statistical probability that thousands of birth defects in children born to a group the size of the plaintiff class might not be unusual even absent exposure to Agent Orange. A trier of fact must also confront the fact that there is almost no evidence, even in studies involving animals, that exposure of males to dioxin causes birth defects in their children.

Both the Veterans' Administration and the Congress have treated the epidemiological studies as authoritative. Although such studies do not exclude the posibility of injury and settle nothing at all as to future effects, they offer little scientific basis for believing that Agent Orange caused any injury to military personnel or their families. The scientific basis for the plaintiffs' case consists of studies of animals and industrial accidents involving dioxin. Dif-

ference in the species examined and nature of exposure facially undermine the significance of these studies when compared with studies of the veterans themselves.

Proving that the ailments of a particular individual were caused by Agent Orange is also extremely difficult. Indeed, in granting summary judgment against those plaintiffs who opted out of the class action (the "optouts".) the district court essentially held that such proof was presently impossible. The first evidentiary hurdle for such an individual is to prove exposure to Agent Orange an event years past that at the time did not carry its current significance. Such evidence generally consist only of oral testimony as to an individual's remembering having been sprayed while on the ground and/or having consumed food and water in areas where spraying took place. The second and, in the view of the district court, insurmountable hurdle is to prove that the individual's exposure to Agent Orange caused the particular ailment late encountered. Plaintiffs do not claim that Agent Orange causes ailments that are not found in the population generally and that cannot result from causes known and unknown other than exposure to dioxin. Plaintiffs' proof of causation would consist largely of inferences drawn from the existence of an ailment, exposure to Agent Orange and medical opinion as to a causal relationship. However, the difficulties in excluding known causes, such as undetected exposure to the same or similar toxic substances in civilian life, and the conceded existence or unknown causes might make it difficult for any plaintiff to persuade a trier of fact as to Agent Orange's guilt. Causation is nevertheless an absolutely indispensable element of each plaintiff's claim.

The plaintiffs' claims are further complicated by the fact that an individual's exposure to Agent Orange cannot be

traced to a particular defendant because the military mixed the Agent Orange produced by various companies in identical, unlabeled barrels. No one can determine, therefore, whether a particular instances of spraying involved a particular defendant's product. In addition, the Agent Orange produced by some defendants had a considerably higher dioxin content than that produced by others. Because the alleged ailments may be related to the amount of dioxin to which an individual was exposed, it is conceivable that if Agent Orange did cause injury, only the products of certain companies could have done so.

Difficult legal problems also arise from the considerable uncertainty as to which product liability rules and statutes of limitations apply to the various plaintiffs. The plaintiffs come from throughout the United States, Australia, and New Zealand, and each would face difficult choice of law problems that might be resolved adversely to their claims.

Finally, doubt about the strength of the plaintiffs' claims exists because of the so-called military contractor defense. The chemical companies sold Agent Orange to the United States government, which used it in waging war against enemy forces seeking control of South Vietnam. It would be anomalous for a company to be held liable by a state or federal court for selling a product ordered by the federal government, particularly when the company could not control the use of that product. Moreover, military activities involve high stakes, and common concepts of risk averseness are of no relevance. To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself.

An illustration of the many factual and legal difficulties facing the plaintiffs is the dispute among their counsel as

to how many "serious" or "strong" claims there are. The Plaintiffs' Management Committee ("PMC") estimates a much smaller number than do counsel for the class members who object to the settlement. Neither group has hard evidence to support its estimates. If by "serious" or "strong" one means a case likely to prevail on liability and to result in a substantial damage award, then we believe that every plaintiff would encounter difficulties in proving causation and even graver problems in overcoming the military contractor defense. If a case is considered "serious" or "strong" because the plaintiff has grave ailments or has died, then such cases do exist although their numbers remain in doubt. What is not in doubt is that the widespread publicity given allegations about Agent Orange have led to an enormous number of claims alleging a large variety of highly common ailments. The illness claimants now attribute to Agent Orange include not only heart disease, cancer, and birth defects, but also confusion, fatigue, anxiety, and spotty tanning.

The procedural aspects of this litigation are also extraordinary. Chief Judge Weinstein certified it as a class action at the behest of most of the plaintiffs and over the objections of all of the defendants. Certain issues, such as the damage suffered by each plaintiff, were not, of course, to be determined in the class action. Instead, they were to be left to individual trials if the outcome of the class action proceedings was favorable to the plaintiffs. Some plaintiffs opted out of the class action, but their cases remained in the Eastern District of New York as part of a multidistrict referral.

The class certification and settlement caused the number of claimants and the variety of ailments attributed to Agent Orange to climb dramatically. It also has caused disunity among the plaintiffs and increased the controver-

sy surrounding this case. Correspondence to this court indicates that many of the original plaintiffs, most of whom joined the motions for class certification, were never advised that use of the class action device might lead to their being represented by counsel whom they did not select and who could settle the case without consulting them. In the midst of this litigation, original class counsel, Yannacone & Associates, asked to be relieved for financial reasons. Control of the class action soon passed to the PMC. Six of the nine members of the PMC advanced money for expenses at a time when the plantiffs' case, already weak on the law and the facts, was near collapse for lack of resources. This money was furnished under an agreement that provided that three times the amount advanced by each lawyer would be repaid from an eventual fee award. These payments would have priority, moreover, over payments for legal work done on the case.

The trial date set by Chief Judge Weinstein put the parties under great pressure, and just before the trial was to start, the defendants reached a $180 million settlement with the PMC. The size of the settlement seems extraordinary. However, given the serious nature of many of the various ailments and birth defects, plaintiffs attributed to Agent Orange, the understandable sympathy a jury would have for the particular plaintiffs, and the large number of claimants, 240,000, the settlement was essentially a payment of nuisance value. Although the chances of the chemical companies', ultimately having to pay any damages may have been slim, they were exposed potentially to billions of dollars in damages if liability was established and millions in attorney's fees merely to continue the litigation.

The district judge approved the settlement. It is clear that he viewed the plaintiffs' case as so weak as to be vir-

tually baseless. Indeed, shortly after the settlement, he granted summary judgment against the plaintiffs who opted out of the class action on the grounds that they could not prove that a particular ailment was caused by Agent Orange and that their claims were barred by the military contractor defense.

In addition, Chief Judge Weinstein awarded counsel fees in an amount that was considerably smaller than had been requested by the attorneys involved. The size of the award was clearly influenced by his skepticism about whether the case should ever have been brought.

The final extraordinary aspect of this case is the scheme adopted by Chief Judge Weinstein to distribute the class settlement award. That scheme, which is described as "compensation-based" rather than "tort-based," allows veterans who served in areas in which the herbicide was sprayed and who meet the Social Security Act's definition of disabled to collect benefits up to a ceiling of $12,000. Smaller payments are provided to the survivors of veterans who served in such areas. No proof of causation by Agent Orange is required, although benefits are available only for non-traumatic disability or death. The distribution scheme also provides for the funding of a foundation to undertake projects thought to be helpful to members of the class.

Many of the decisions of the district court were appealed, and we summarize our rulings here. In this opinion, we reject the various challenges to the certification of a class action. Although we share the prevalent skepticism about the usefulness of the class action device in mass tort litigation, we believe that its use was justified here in light of the centrality of the military contractor defense to the claims of all plaintiffs. We also approve the settlement in light of both the pervasive difficulties faced by plaintiffs in

establishing liability and our conviction that the military contractor defense absolved the chemical companies of any liability. In a second opinion by this author, 818 F.2d 179, we afirm the distribution scheme's provision for disability and death benefits to veterans exposed to Agent Orange and their survivors. We reverse the scheme's establishment of a foundation; however, the district court may on remand fund and supervise particular projects it finds to be of benefit to the class. A third opinion by this author, 818 F.2d 187, affirms the grant of summary judgment against the opt-out plaintiffs based on the military contractor defense. On two grounds we hold that the chemical companies did not breach any duty to inform the government of Agent Orange's hazardous properties. First, at the time relevant here, the government had as much information about the potential hazards of dioxin as did the chemical companies. Second, the weight of present scientific evidence does not establish that Agent Orange caused injury to personnel in Vietnam. The chemical companies did not breach any duty to inform the government and are therefore not liable to the opt-outs.

In an opinion by Judge Van Graafeiland, 818 F.2d 194, we affirm the district court's dismissal of actions against the United States by veterans on the grounds that they are barred by the *Feres* doctrine and the discretionary function exception to the Federal Tort Claims Act. A second opinion by Judge Van Graafeiland, 818 F.2d 204, affirms the dismissal of an action against the United States by the chemical companies seeking contribution or indemnity for the $180 million they paid in settling with the plaintiff class. A third opinion, 818 F.2d 210, affirms the dismissal of civilian actions against the United States on discretionary function grounds and of similar actions against the chemical companies on statute of limitations and military

contractor defense grounds. A final opinion by the same author, 818 F.2d 201, affirms the dismissal of the so-called "direct" claims by families of veterans against the government on *Feres* and discretionary function grounds.

An opinion by Judge Miner, 818 F.2d 216, invalidates the PMC members' agreement to repay on an "up front" basis treble the expenses that any of them advanced. We hold that this agreement creates a conflict of interest between the attorneys and the class by generating impermissible incentives to settle. A second opinion by Judge Miner, 818 F.2d 226, affirms the district court's award of counsel fees except with regard to the abrogation of one fee award.

II. DETAILED HISTORY OF PROCEEDINGS

1) *Early Proceedings*

Plaintiffs allegedly were exposed to the herbicide Agent Orange as a consequence of efforts undertaken by the United States military forces to defoliate the jungle in Vietnam. One purpose of this defoliation project, known as "Operation Ranch Hand," was to clear away foliage near supply transport lines, power lines, and military bases, and thus deprive enemy forces of protective cover. The herbicide was also used to destroy crops available to the enemy. Some plaintiffs claim to have been directly exposed to the herbicide, while others claim that it contaminated the food and water they consumed or the ground on which they slept.

Although various herbicides were used during the war, Agent Orange was thought to be best suited for the military's purposes and was used most frequently. Agent Orange was a mixture of the herbicides known as 2,4-D

and 2,4,5-T.[1] The manufacture of 2,4,5-T is said inevitably to result in the production of dioxin, which is alleged to be a highly toxic substance. Whether the trace elements of dioxin in Agent Orange were hazardous to persons in sprayed areas is sharply disputed. Indeed, the toxicity of dioxin itself remains a controversial issue. *See generally* P. Schuck, *Agent Orange on Trial 16-21 (1986); M. Gough, Dioxin, Agent Orange* (1986).

The Agent Orange litigation began is July 1978, with the filing of a lawsuit by Vietnam veteran Paul Reutershan, now deceased, in Supreme Court, New York County. The defendants were several chemical companies alleged to have manufactured Agent Orange. That case was removed to federal court and then transferred to the Eastern District of New York. On January 8, 1979, Reutershan's estate filed an amended complaint seeking relief on behalf of a class of veterans and their families injured by Agent Orange. Several other complaints alleging similar class claims were filed in late 1978 and early 1979. In March 1979, counsel for Reutershan's estate and for defendant Dow Chemical Co. jointly petitioned pursuant to 28 U.S.C. § 1407(c) (1982) for the establishment of a multidistrict litigation proceeding. The Judicial Panel on Multidistrict Litigation established *In re In re "Agent Orange" Product Liability Litigation*, MDL No. 381, in the Eastern District of New York. The first cases were transferred to the Eastern District on May 8, 1979, and nearly 600 cases have since been transferred. MDL No. 381 was assigned to then District Judge Pratt.

The third amended class complaint in the area designated by the court as the lead action alleged federal ques-

[1] "2,4-D" and "2,4,5-T" are the abbreviated names of 2,4-Dichlorophenoxyacetic acid and 2,4,5-Trichlorophenoxyacetic acid respectively.

tion jurisdiction under the "common law and/or the statuary laws of the United States." Defendants moved to dismiss this complaint for want of subject matter jurisdiction. Judge Pratt adopted the federal common law theory and accordingly denied the motion. *In re In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 737, 743-49 (E.D.N.Y. 1979). However, a divided panel of this court reversed. *In re In re "Agent Orange" Product Liability Litigation* 635 F.2d 987 2d Cir. 1980), *cert. denied,* 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). The class action thereafter proceeded in federal court solely on the basis of diversity jurisdiction under 28 U.S.C. § 1332 (1982).

Defendants next moved for summary judgment based on the so-called military contractor defense. The motion contended that the plaintiffs' claims against the chemical manufacturers were barred on the grounds:

> (1) that they merely manufactured and supplied Agent Orange to the government pursuant to validly authorized contracts[;] (2) that Agent Orange was not manufactured before and has not been manufactured since; (3) that they completed their compelled manufacture of Agent Orange in strict compliance with the specifications supplied by the government, specifications that contained no obvious or "glaring" defects that would have alerted the defendants of any impending danger in following them; and (4) that they manufactured Agent Orange without any negligence on their part.

In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 795 (E.D.N.Y. 1980).

Although Judge Pratt stated that this defense might be available to the defendants, *id.* at 796, he denied defen-

dants' motion on the ground that their own descriptions of their contract performance and their relationship to the government raised issues of fact requiring a trial. *Id.*

Judge Pratt planned to hold an initial trial on the military contractor defense and allowed discovery on this issue. He stated:

> The elements of the defense will be uniquely adapted to consideration and adjudication, separate and apart from the issues of liability, causation and damages. As a practical matter, discovery as to these discrete issues will be rather narrow compared to the discovery that some of the other fact issues presented by this action may require.

Id.

In addition, Judge Pratt stated his intention to certify a class pursuant to Fed.R.Civ.P. 23(b)(3) of "persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom." *Id.* at 788. He noted that "it may later prove advantageous to create subclasses for various purposes." *Id.* Judge Pratt rejected plaintiffs' request for certification of a "limited fund" class action pursuanht to Fed.R.Civ.P. 23(b)(1)(B), on the ground that plaintiffs had failed to offer evidence that the defendants were likely to become insolvent if held liable for plaintiffs' injuries. *Id.* at 789-90.

Following eleven months of discovery, defendants Hercules, Thompson Chemical, Riverdale Chemical, Hoffman-Taft, Dow Chemical, TH Agriculture and Nutrition, and Uniroyal again moved for summary judgment on the military contractor defense. Defendants Monsanto and Diamond Shamrock did not join in the motion. Judge Pratt granted summary judgment to Hercules,

Thompson Chemical, Riverdale Chemical, and Hoffman-Taft, but denied the motions of Dow Chemical, TH Agriculture and Nutrition, and Uniroyal. *In re "Agent Orange" Product Liability Litigation* 565 F. Supp. 1263 (E.D.N.Y. 1983). He also concluded that the planned separate trial on the military contractor defense was not desirable. He noted that discovery and argument of motions on the military contractor defense had revealed that the defense implicated factual issues also central to both liability and causation and thus should not be tried separately. Subsequently, defendants Hercules and Thompson Chemical were reinstated as defendants.

In 1980, Yannacone & Associates, a consortium of lawyers who banded together for purposes of this litigation, was designated lead counsel for the representatives of the plaintiff class. *See* 506 F. Supp. at 788 n. 32. In 1983, the firm of Ashcraft & Gerel and attorneys Benton Musslewhite, Steven Schlegel, and Thomas Henderson joined Yannacone & Associates as lead counsel for the representatives of the class. In September 1983, Yannacone & Associates moved to be relieved of its duties as class counsel, citing an inability to bear the costs associated with the litigation. This motion was granted. Ashcraft & Gerel sought to gain control of the case but failed to do so and withdrew as class counsel. As we describe *infra,* Musslewhite, Schlegel, and Henderson then recruited additional attorneys to the PMC. *See generally* Schuck, *Agent Orange on Trial* at 73-77, 94-95, 102-110. Although not a member of the PMC, Ashcraft & Gerel has continued to represent plaintiffs who have opted out of the class action, certain civilian plaintiff, and certain class members who object to the settlement.

2) *Class Certification.*

Judge Pratt's duties as a newly-appointed member of

this court precluded him from continuing as trial judge, and in October 1983, Chief Judge Weinstein assumed responsibility for MDL No. 381. After conferring with the parties, he ordered the trial of the class claims to begin on May 7, 1984. He formally certified a Rule 23(b)(3) class, finding.

> (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs case and the judicial economies that would result from a class trial, a claim action is superior to all other method for a "fair and efficient adjudication of the controversy."

In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 724 (E.D.N.Y. 1983) (*"Class Certification Opinion."*)

Chief Judge Weinstein defined the plaintiff class as

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-tri-chlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729.

In addition, Chief Judge Weinstein certified a Rule 23(b)(1)(B) mandatory class on the issue of punitive

damages, though not on the ground, previously rejected by Judge Pratt, that the claims against the defendants could render them insolvent. Rather, he reasoned that because the purpose of punitive damages is not to compensate but to punish, some limits should be imposed on the amount of punishment meted out to the defendants for a single transaction. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838–42 (2d. Cir. 1967) (Friendly, J.) Chief Judge Weinstein reasoned that punitive damages might be awarded, if at all, only to the first plaintiffs to receive a judgment. He concluded that

> it would be equitable to share [a punitive damage award] among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule [23](b)(1)(B), non-class members who opt out under Rule l23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

F.R.D. at 728.

Chief Judge Weinstein also required that plaintiffs' counsel, at their own expense, provide notice to the members of the class as follows:

(1) Written notice was to be mailed to (a) all persons who had filed actions in the federal district courts, or had filed actions in state courts later removed to federal court, that were pending in or transferred to the Eastern District; (b) all persons who had intervened or sought to do so; (c) each class member then represented by counsel associated with the PMC who had not yet commenced an action or sought to intervene; (d) all persons then listed on the United States Government's Veterans' Administration "Agent Orange Registry";

(2) Announcements were to be sent to the major radio

and television networks, and to radio stations with a combined coverage of at least one half of the audience in each of the top 100 radio markets;

(3) Notice was to be published in certain leading national newspapers and magazines, in servicepersons' publications, and in newspapers in Australia and New Zealand;

(4) A toll-free "800" telephone number was to be obtained and staffed by persons who would provide callers with basic information about the litigation;

(5) Notice was to be sent to each state governor requesting that he or she refer the notice to any state agency dealing with the problems of Vietnam veterans.

The notice sent to individual veterans, reprinted in the appendix to this opinion, informed potential class members of the pendency of the class action and their right to opt out of the Rule 23(b)(3) class. The notice made clear that exclusion could be effectuated only by written request, and an "Exclusion Request Form" was attached to the notice for convenience.

Following certification of the two classes, the defendants petitioned this court for a writ of mandamus to compel the district court to vacate certification of the classes. *See In re Diamond Shamrock Chemicals Co.*, F.2d 858 (2d Cir.), *cert. denied,* 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). In denying the petition, we noted that "mandamus is an extraordinary remedy," *id.* at 859, and that "[r]eview of the many issues raised by the class certification will be available when the ramifications of each aspect of the ruling will be evident." *Id.* at 862. We also stated that "it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be

disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely." *Id.* at 860–61. We further observed that the notice required was at least arguably the best practicable under the circumstances. *Id.* at 862.

Various plaintiffs, as a means of challenging the settlement, now appeal from the class certification. They contend that the district court lacked subject matter jurisdiction, that there were insufficient common questions of law and fact to justify certification, and that the notice was inadequate.

3) *The Settlement*

In April 1984, Chief Judge Weinstein appointed three special masters—Leonard Garment, Kenneth Feinberg, and David Shapiro—to assist in negotiations over a settlement of the class action. These negotiations intensified during the weekend before trial. *See* Schuck, *Agent Orange on Trial* at 49–66. On May 7, 1984, the day the trial was to have begun, the class representatives and the chemical companies agreed to settle the class claims for $180 million. Thereafter, Chief Judge Weinstein conducted eleven days of hearings on the proposed settlement in New York, Atlanta, Houston, Chicago, and San Francisco. At these hearings, nearly 500 witnesses addressed the fairness of the settlement. Chief Judge Weinstein also considered "hundreds of written communications from veterans, members of their families, veterans' organizations and others . . . and read a large part of the relevant literature, taking judicial notice of its substance." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 748 (E.D.N.Y. 1984) (*"Settlement Opinion"*).

By May 6, 1984, the day before the settlement was reached, some 2,440 class members had opted out of the

Rule 23(b)(3) class action by filing requests for exclusion. The settlement agreement provided for a period during which persons who had opted out of the class could be reinstated as class members if they filed a request with the district court. Settlement Agreement ¶ 8, *id.* at 865. Some 600 such requests were received. Chief Judge Weinstein stated that he would consider late applications to rejoin the class "sympathetically." *Id.* at 757.

In a lengthy opinion, reported at 597 F.Supp. 740 (E.D.N.Y. 1984), Chief Judge Weinstein approved the settlement subject to hearings on counsel fees and preliminary consideration of plans for distribution of the settlement proceeds. Various members of the class appeal from the approval of the settlement on the ground that the $180 million award is inadequate.

4) *Counsel Fees*

By late 1983, the three remaining members of the PMC – Schlegel, Musslewhite, and Henderson – found that they lacked the resources necessary to continue the litigation. In order to attract new members both to finance and staff the lawsuit, the members of the PMC entered into a agreement whereby those members who advanced money for expenses were to be repaid at three times the amount of money advanced "off the top" out of any award of counsel fees. The agreement also established a formula, later rescinded, by which the remainder of the fee award was to be distributed among the PMC members. As a result, those who had advanced money for expenses in return for a trebled repayment controlled six of the nine PMC votes. Chief Judge Weinstein was not informed of this agreement until after the case had been settled.

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By late 1983, the three remaining members of the PMC – Schlegel, Musslewhite, and Henderson – found that they lacked the resources necessary to continue the litigation. In order to attract new members both to finance and staff the lawsuit, the members of the PMC entered into a agreement whereby those members who advanced money for expenses were to be repaid at three times the amount of money advanced "off the top" out of any award of counsel fees. The agreement also established a formula, later rescinded, by which the remainder of the fee award was to be distributed among the PMC members. As a result, those who had advanced money for expenses in return for a trebled repayment controlled six of the nine PMC votes. Chief Judge Weinstein was not informed of this agreement until after the case had been settled.

After the settlement, more than 100 applications for attorneys' fees and expenses were submitted to the district

court. Hearings on these applications were held on September 26 and October 1, 1984. On June 18, 1985, Chief Judge Weinstein issued and amended order awarding a total of $10,767,443.63 in fees and expenses to 88 law firms and individual lawyers for their work on behalf of the class. *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1344-46 (E.D.N.Y. 1985). The district court followed the so-called "lodestar" approach to attorneys' fees awards, *see City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*"Grinnel I"*), and *City of Detroit v. Grinnel Corp.*, 560 F.2d 1093 (2d Cir. 1977) (*"Grinnell II"*), using national hourly rates of $150 for partners, $125 for law professors, and $100 for associates. The court increased some fee awards by a quality multiplier, ranging from 1.50 to 1.75, to reward those who exhibited "exceptional or extraordinary skill" in the litigation. 611 F.Supp. at 1328. The court declined, however, to apply and overall risk multiplier to the lodestar amount. Appeals have been taken from these rulings.

As noted, the PMC agreement required a trebled return of funds advanced off the top of any fees awarded by the court. Some PMC members therefore stood to receive enormously greater fees than they were awarded by the court, while others stood to receive substantially less. For example, David J. Dean, who was to have served as lead trial counsel and was awarded $1,424,283 in fees by the district court, would receive only $542,310 under the fees sharing agreement. In contrast, Newton Schwartz, who was awarded only $41,886 by the district court, would receive $513,026 under the agreement.

Chief Judge Weinstein denied a motion by Dean to set aside the fee-sharing agreement after concluding that the agreement had no adverse impact on the interests of the class. *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1452, 1458-62 (E.D.N.Y. 1985). However, he

ordered that "[i]n future cases, *as soon as a fee-sharing arrangement is made its existence must be made known to the court* and through the court to the class." *Id.* at 1463. Dean has appealed from that ruling.

5) *Distribution of the Settlement*

A number of proposals for distribution of the settlement fund were presented to Chief Judge Weinstein. We focus on the plans submitted by the PMC, by Victor Yannacone, original lead counsel for the class, and by Special Master Feinberg.

The PMC proposed to compensate all class members who could prove that they suffered from any of 24 medical conditions that the PMC's experts associated with exposure to Agent Orange. These conditions included chloracne; peripheral and central neuropathy; various liver disorders, including cirrhosis, chronic hepatitis, and porphyria cutanea tarda; gastrointestinal conditions; hematological, endocrinal, and metabolic problems; benign and malignant tumors; birth defects; and miscarriages. The PMC proposal also suggested providing compensation to claimants with other medical problems, such as arthritis, heartburn, abdominal pain, and diarrhea, that seem to have been reported in the literature as possibly accompanying Agent Orange exposure." The PMC would have adjusted each compensation award by a number of "individual discount factors" to reflect a claimant's financial needs and the legal and factual difficulties that the claimant would have encountered in proving his or her case in court. Accordingly, two claimants with similar medical conditions might have received different monetary awards depending, for example, on their collateral source payments, numbers of dependents, and ability to receive gratuitous services; the statutes of limitations and availability of a strict liability cause of action under the applicable state law; their action under the ap-

plicable state law levels of exposure to Agent Orange and/or dioxin, a factor the PMC has abandoned on appeal; their individual and family medical histories; "life style considerations"; and damages. The PMC suggested that the settlement fund might also be used to provide class-wide benefits such as "preventive and genetic counseling, health monitoring, research and [group life and health] insurance."

The Yannacone proposal would have deferred any distribution of the settlement fund to individual claimants pending a survey of "who the Viet Nam veterans are, what their present state of health is, and how many have already died and from what causes." Yannacone urged that a portion of the settlement fund be used to establish a "Viet Nam Veterans Legal Assistance Foundation" to assist class members in obtaining disability benefits from the Veterans' Administration. Yannacone's proposal purported to speak for thousands of veterans and their families who "reaffirm[ed] their original position that the purpose of the *Agent Orange* litigation was to establish a trust fund for the benefit of all the *Agent Orange* victims not to benefit any individual veteran at the expense of their [sic] comrades-in-arms."

Special Master Feinberg proposed that the greater part of the settlement fund be distributed to individual veterans and family members in the form of death and disability benefits. The difficulties of establishing a causal link between a claimant's injuries and exposure to Agent Orange were to be avoided by compensating all claimants who had been exposed to the defoliant and who later died or became disabled as a result of non-traumatic causes. The Special Master proposed that the remainder of the settlement fund be used to provide services to the class as a whole and in particular to children with birth defects.

Chief Judge Weinstein conducted a public hearing on the various distribution plans on March 5, 1985. More

than 40 speakers, including members of the PMC, Yannacone, representatives of veterans organizations, and individual class members, participated in the hearing. The PMC and other interested persons were allowed additional time following the hearing to submit written comments on the distribution proposals.

On May 28, 1985, Chief Judge Weinstein issued an order establishing a plan for distribution of the settlement fund. *In re "Agent Orange" Product Liability Litigation ("Distribution Opinion"),* 611 F.Supp. 1396 (E.D.N.Y. 1985). He adopted with slight modifications the Special Master's proposal, which he described as "an elegant solution [combining] insurance-type compensation to give as much help as posible to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help." *Id. at* 1400. The plan provided that 75 percent of the $180 million settlement fund, including accrued interest, would be distributed directly "to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died." *Id.* at 1410-11. A claimant would qualify for compensation by establishing exposure to Agent Orange and death or disability not "predominantly caused by trauma, whether or not self-inflicted." *Id.* at 1412.

Chief Judge Weinstein offered four reasons for providing individual compensation payments only to disabled veterans and to survivors of deceased veterans. First, because the settlement fund was "not sufficient to satisfy the claimed losses of every class member," *id.* at 1411, it would be equitable to limit payments to those with the most severe injuries. Second, the payments would be made only to veterans or survivors, and not to children who had suffered birth defects and wives who had suffered miscar-

riages, because "however slight the suggestion of a causal connection between the veterans' medical problems and Agent Orange exposure, even less evidence supports the existence of an association between birth defects [or miscarriages] and exposure of the father to Agent Orange in Vietnam." *Id.* Third, claim processing costs would be minimized under the plan because claimants would not be required to prove that they suffered from any particular disease or that the disease was caused by exposure to Agent Orange; the court reasoned that any alternative eligibility criteria would require "[c]reation of a costly new claims-processing bureaucracy" and "impose on the applicant the enormous burdens of producing volumes of medical records and paying expensive medical and legal fees for complicated processing and testing." *Id.* Finally, the distribution plan "'obviate[s] the necessity for particularized proof' and is 'a fair response to the particular difficulties that this class would have in gathering and presenting evidence of damages.'" *Id.* (quoting *In re Chicken Antitrust Litigation American Poultry,* 669 F.2d 228, 240 & n. 20 (5th Cir. 1982)).

Chief Judge Weinstein rejected as "essentially arbitrary," *id.* at 1409, the PMC Plan to provide compensation only for specified diseases. He reasoned that "[n]o factual basis exists for choosing or excluding any disease, since causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability." *Id.* In addition, he concluded that the costs of establishing the existence of particular diseases and applying individual discount factors would be burdensome and expensive for both the fund and the claimant. *Id.* at 1408-09.

Chief Judge Weinstein set aside most of the remainder of the settlement fund to support a "class assistance foundation that would "serve as a national focus for Vietnam

veterans who are class member to mobilize themselves and others to deal with their medical and related problems." *Id.* at 1432. The "broad mandates" of the foundation were defined as "to found projects to aid children with birth defects and their families and alleviate reproductive problems" and "to fund projects to help meet the service needs of the class as a whole." *Id.* at 1437. The district judge reasoned that the foundation was "[t]he most practicable and equitable method of distributing benefits" to class members who were neither disabled veterans or survivors of deceased veterans, because "[d]istribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class." *Id.* at 1431.

The court offered a number of examples of the sorts of programs for which the foundation might provide financial support. The projects that might be funded for children with birth defects included "[p]rotection and advocacy services," "[g]rants to hospitals and clinics," "insurance programs," "vocational training projects," "grants to establish peer support groups to enable children with birth defects to discuss their problems openly among themselves," and "[g]rants or loans . . . to families in grave financial need to help pay for essential medical services." *Id.* at 1438-39. Other possibilities "for funding of classwide services" enumerated by the court included projects to "help class member veterans better obtain and utilize VA services and to monitor the VA and other federal and state services to ensure that they are responsive to the needs of the class," to "increase public awareness of the problems of the class," to provide health information and social service assistance to the class, and to "help members of the class become a more integrated part of society." *Id.* at 1440.

The foundation was to be administered by a board of directors "comprised primarily of Vietnam veterans." *Id.* at 1434. The court would apoint the initial board of directors of between 15 and 45 members, which would thereafter be "self-governing and self-perpetuating." *Id.* at 1435. Subject only to the general supervisory authority retained by the court, the board would control "every aspect of foundation administration," including "investment and budget decisions, specific funding priorities, a detailed grant application process, the actual grant awards, evaluation mechanisms, and fundraising strategies." *Id.* The court would play "[a] comparatively modest supervisory role in the operation of the class assistance foundation," while retaining the power to "supervise foundation operations actively and exercise control as necessary to protect the interests of the class." *Id.* at 1436.

Chief Judge Weinstein reappointed Special Master Feinberg to oversee the implementation of the distribution plan. *Id.* at 1400. However, no claimants were to receive payments and no services were to be funded until the appellate process was completed *Id.* at 1451.

The PMC filed an appeal and petition for a writ of mandamus/prohibition on August 19, 1986, seeking to overturn the distribution plan. On September 5, 1986, Mr. Yannacone filed a petition for a writ of mandamus/prohibition seeking removal of the PMC as class counsel and implementation of his proposed distribution plan.

6) *Dismissal of the Opt-Out Cases*

After settling with the class, defendants moved on July 24, 1984, for summary judgment against the opt-outs. Chief Judge Weinstein dismissed the opt-outs on the

grounds that, *inter alia,* no plaintiff was able as a matter of law to produce sufficient evidence to allow a trier of fact to find that Agent Orange had caused the particular ailment(s) from which he or she suffered. *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1223, 1256-63 (E.D.N.Y. 1985) (*"Opt-Out Opinion"*). As a second, independently dispositive ground, Chief Judge Weinstein held that the military contractor defense precluded recovery. *Id.* at 1263-64. Certain opt-out plaintiffs appeal from those decisions.

7) *Proceedings Against the Government and Miscellaneous Actions.*

The first direct claim against the United States was asserted by veterans who believed that they had been exposed to Agent Orange. Ryan v. Cleland, 531 F.Supp. 724 (E.D.N.Y. 1982). The plaintiffs alleged that the government and certain government officials were liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) *et seq.,* for failing to warn them of the possible dangers associated with exposure to Agent Orange and neglecting to provide proper medical care for those who had been injured by the herbicide. Judge Pratt held that the United States was immune from suit under the FTCA on the failure-to-warn claims because those claims were "incident to and arising out of" the plaintiffs' military service and therefore fell within the exception to the government's waiver of sovereign immunity recognized in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and its progeny. 531 F.Supp. at 728. The remainder of the complaint was dismissed on various jurisdictional grounds that are not challenged on appeal.

The government refused to participate in the negotiations that culminated in the settlement of the class action.

See Settlement Opinion, 597 F.Supp. at 879 (letter from government counsel to court). In the settlement agreement, the plaintiff class and the defendant chemical manufacturers "expressly reserve[d] all rights and claims which they now have, or may at any time be entitled to assert against the United States, including its offices, departments, agencies, representatives, agents and employees." Settlement Agreement ¶ 11, *id.* at 865. Veterans and their families renewed their efforts to obtain relief from the government following the settlement. In July 1984, and Eighth Amended Complaint was filed on behalf of a number of named plaintiffs (the "Aguiar plaintiffs") and a proposed plaintiff class composed of veterans who claimed injury from exposure to Agent Orange and their spouses, parents, and children. In an attempt to circumvent the *Feres* doctrine, the complaint alleged that the government and certain government officials had engaged in negligent and intentionally tortious conduct that occurred before, during, and after the veterans' military service.

Chief Judge Weinstein refused to certify the plaintiffs' claims against the government as a class action, reasoning that "the enormous expenditure required to notify potential class members is not justified given the almost nonexistent possibility of recovery against the government on the merits." *In re "Agent Orange" Product Liability Litigation,* 603 F.Supp. 239, 242 (E.D.N.Y. 1985). In addition, he stated that class certification would unfairly preclude children with birth defects from bringing suit were future scientific studies to establish the validity of their claims against the government. *Id.* Chief Judge Weinstein then dismissed all claims against the government by veterans, as well as all derivative claims by veterans' spouses and children on such theories as loss of earning and services. Agreeing with Judge Pratt that the

United States was immune from suit on such claims under *Feres,* he rejected the plaintiffs' efforts to circumvent the *Feres* doctrine. *Id.* at 243-45. An appeal has been taken from that ruling.

Chief Judge Weinstein also concluded that the veterans' wives and children had produced "no evidence of any probative value" demonstrating that their miscarriages and birth defects were caused by Agent Orange or refuting "the government's overwhelming showing of no present proof of causation." *Id.* at 247. He therefore granted summary judgment to the government with respect to the wives' "direct" claims for independent injuries. However, he dismissed the children's direct claims without prejudice, reasoning that "discretion should generally be exercised in favor of an infant who lacks evidence to support his or her claim but who may obtain such evidence in the future." *Id.* at 247.[2].

In a related action, two former civilian employees of the University of Hawaii and the widow of a third brought suit against the United States, the manufacturers of Agent Orange, and the former Regents of the University for injuries allegedly sustained during Agent Orange experiments at the University in 1967. *In re "Agent Orange" Product Liability Litigation (Fraticelli v. Dow Chemical Co.),* 611 F.Supp. 1285 (E.D.N.Y. 1985). Chief Judge

[2] A complaint essentially equivalent to the Eighth Amended Complaint was subsequenlty filed on behalf of a second group of plaintiffs (the "Adams plaintiffs") in the Southern District of Texas and transferred to the Eastern District of New York. On June 19, 1986, Chief Judge Weinstein disposed of this action in the same manner as he had disposed of the earlier action against the government. The dismissal of the veterans' claims has been appealed in both actions; however, the summary judgment on the wives' direct claims has been appealed only in the later action.

Weinstein denied certification of a proposed plaintiff class consisting of 35,000 unnamed residents of Kauai County, Hawaii. He reasoned that the named plaintiffs had failed to demonstrate that they shared a common interest with the remainder of the proposed class. *Id.* at 1288. Chief Judge Weinstein then disposed of the individual plaintiffs' claims against each of the defendants. He dismissed the claims against the chemical manufacturers and the former Regents, with the exception of the widow's wrongful death claims, as barred by Hawaii's two-year statute of limitations for personal injury actions. *Id.* at 1288-89. He also dismissed the claims against the former Regents on the ground that Hawaii's workers' compensation statute provides the exclusive remedy against an employer for work-related injuries. *Id.* at 1289. Finally, he granted summary judgment in favor of all defendants, having found "no admissible evidence that Agent Orange caused plaintiffs' illnesses." *Id.* An appeal has been taken.

The defendant chemical manufacturers served third-party complaints against the government for indemnification or contribution in January 1980. Judge Pratt dismissed the third-party complaints in their entirety on the basis of *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), which bars a defendant from obtaining indemnification or contribution from the government for damages paid to a serviceman-plaintiff in circumstances where the serviceman would be barred by *Feres* from suing the government directly for his injuries. *In re "Agent Orange" Product Liability Litigation,* 506 F.Supp. 762 (E.D.N.Y. 1980). However, no formal order of dismissal was entered.

Chief Judge Weinstein reconsidered the dismissal of the third-party complaints after he took charge of the Agent Orange litigation. *See In re "Agent Orange" Product*

Liability Litigation, 580 F.Supp. 1242 (E.D.N.Y.), *mandamus denied,* 733 F.2d 161 (2d Cir. 1984). Analyzing the three rationales for the *Feres* doctrine, Chief Judge Weinstein held that it barred suit against the government only with respect to the claims of the veterans and the derivative claims of their families. 580 F.Supp. at 1247. He therefore reinstated the defendants' third-party complaints against the government as to the direct claims of the veterans' wives and children for their own injuries on the ground that such claims were precluded by neither *Feres-Stencel* nor by any of the statutory exceptions to government liability contained in the FTCA. *Id.* at 1247-56. Chief Judge Weinstein later granted summary judgment to the government on the outstanding third-party claims. *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1221 (E.D.N.Y. 1985). Reasoning that the FTCA precludes recovery against the United States "[i]n the absence of some form of [governmental] misfeasance," he found no such misfeasance in the instant case. *Id.* at 1223. He thus rejected the defendants' claim that the government had withheld information about Agent Orange from them in the mid-1960's finding that the defendants and the government had "essentially the same knowledge about possible dangers from dioxin in Agent Orange." *Id.* An appeal has been taken.

III. CLASS MEMBERS' OBJECTIONS TO THE SETTLEMENT

We now address the various objections to the maintenance and settlement of the class action made by some class members.

1) *Subject Matter Jurisdiction.*

The third amended complaint alleged that its class action claims were governed *inter alia,* by "federal common law" and that the district court therefore had federal question jurisdiction. Judge Pratt agreed. *In re "Agent Orange" Product Liability Litigation,* 506 F.Supp. 737, 749 (E.D.N.Y. 1979). We reversed, *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed. 2d 116 (1981), and the class action was thereafter maintained solely on the basis of diversity jurisdiction. Appellants, members of the plaintiff class, now contend that a diversity class action cannot be brought in federal court absent complete diversity of citizenship between all class members and all defendants. It goes without saying that such complete diversity is lacking in this case.

Although we understand the need to preserve issues for further review, we confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is hornbook law, based on 66 years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action. 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3606, at 424 (2d ed. 1986) ("[t]he courts look only to the citizenship of the representative parties in a class action"). As the Supreme Court noted in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053. 22 L.Ed.2d 319 (1969):

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens

> of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 [41 S.Ct. 338, 65 L.Ed. 673] (1921).

394 U.S. at 340, 89 S.Ct. at 1059. *See also United States ex rel. Sero v. Preiser,* 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied,* 421 U.S. 921, 95 S.Ct. 1587, 43 L.Ed.2d 789 (1975). Thus, if appellants' theory of class action jurisdiction is to become law, this must be done by the Supreme Court.

Appellants also argue that even if *Snyder v. Harris* is good law, three of the named plaintiffs were co-citizens of three of the defendants. They contend that: (1) named plaintiff Michael F. Ryan and defendant Hooker Chemical were citizens of New York; (2) named plaintiff Brian T. Quinn and defendant Riverdale Chemical were citizens of Illinois; and (3) named plaintiffs Dan G. Jordan and defendant Diamond Shamrock were citizens of Texas.

Both Hooker Chemical and Riverdale Chemical effectively ceased to be parties to the case before the filing of the final amended class complaint against the Agent Orange Manufacturers. Hooker was granted summary judgment in February 1982, on the ground that it did not manufacture Agent Orange. *In re "Agent Orange" Product Liability Litigation,* 534 F.Supp. 1046, 1052 (E.D.N.Y. 1982). Riverdale's unopposed motion for summary judgment was granted in May 1983. *See In re "Agent Orange" Product Liability Litigation,* F.Supp. 1263, 1272 (E.D.N.Y. 1983).

Appellants argue that because no Rule 54(b)[3] certification of dismissal was issued as to either Hooker or Riverdale both defendants remain in the case for purposes of determining diversity jurisdiction. We believe that their view misconstrues Rule 54(b). The Supreme Court had noted that the "obvious purpose" of Rule 54(b) is to provide "an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950). Because the purpose of the rule is thus only to clarify the appealability of an order, a dismissed defendant who fails to obtain a Rule 54(b) certification does not remain a party to the case for purposes of determining diversity.

Appellants' allegation regarding the citizenship of Diamond Shamrock is equally meritless. At the time the action was initiated against Diamond Shamrock, its prin-

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[3] Fed.R.Civ.P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or me but fewer than all of the claims or parties only upon an express determination that there is no just reasons for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

cipal place of business was in Ohio. The fact that it has since moved to Texas, the domicile of named plaintiff Dan Jordan, is irrelevant for diversity purposes. *See Smith v. Sperling,* 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1113, n.1, 1 L.Ed.2d 1205 (1957) ("jurisdiction, once attached, is not impaired by a party's later change of domicile"). Thus, all of appellants' claims that diversity of citizenship is lacking are without merit.

Finally, appellants contend that the district court lacked jurisdiction over the class action because not all members of the class met the $10,000 jurisdictional requirement. *See Zahan v. International Paper Co.,* 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973) ("[e]ach plaintiff in a Rule 23(b)(3) class action must satify the jurisdictional amount, and any plaintiff who does not must be dismissed from the case"). However, "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938) (footnotes omitted). Appellants do not argue that any class members made bad faith damage claims. Nor do they offer us any basis for determining whether such claims clearly are for less than the jurisdictional amount. Instead, they claim the district court failed to carry out an obligation to police the damage claims. No such affirmative obligation exists, however, absent some apparent reason to make inquiry. Plaintiffs made what must be assumed to have been good faith allegations that each of them was entitled to at least $10,000 in damages. Defendants did not challenge the *bona fides* of these claims, and the district court thus had no reason to inquire further.

2) *In Personam Jurisdiction*

Appellants contend that the district court was barred by the due process clause of the fifth amendment from exercising personal jurisdiction over class members who lack sufficient contacts with New York as defined in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. However, appellants concede, as they must, that Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. *See Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 442, 66 S.Ct. 242, 245, 90 L.Ed. 185 (1946) ("Congress could provide for service of process anywhere in the United States"). One such piece of legislation is 28 U.S.C. § 1407 1982), the multidistrict litigation statute. In the instant case, the district court was acting pursuant to a valid transfer order of the Judicial Panel on Multidistrict Litigation that was created by that statute. As the Panel has recognized,

> Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue . . . . Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor actions transferred to him that the transferor judge would have had in the absence of transfer.

In re FMC Corp. Patent Litigation, 422 F.Supp. 1163, 1165 (J.P.M.D.L. 1976) (citations omitted). *See also In Re Sugar Industry Antitrust Litigation,* 399 F.Supp. 1397, 1400 (J.P.M.D.L. 1975) (rejecting due process challenge similar to that raised by appellants in the instant case). Appellants' argument therefore fails.

3) *Class Certification*

Appellants argue that the district court erred in certifying the Rule 23(b)(3) class action. They make the same arguments made by the defendants in petitioning for a writ of mandamus seeking decertification of the class action. *See In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert denied,* 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). In denying the mandamus petition, we expressed doubt as to the existence of any issue of fact, let alone a common issue, regarding "general causation." *See* 724 F.2d at 860. We also stated, however, that "it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely." *Id.* at 860-61. Therefore, we denied the petition. We stressed, however, that our scope of review in the mandamus proceeding was limited to the redress of a calculated disregard of governing rules, *id.* at 860, not the correction of ordinary error, and that the propriety of a class certification might be fully reviewed on a later appeal. *Id.* at 862. This is that appeal.

Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are question of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Existence of the first prerequisite in this case is undisputed. Whether there are problems regarding typicality and adequacy of representation depends upon the nature of the questions of law or fact common to the class. Our view of the existence of the third and fourth prerequisites is thus influenced by our view of the second.

We must also look to the requirements of Rule 23(b)(3) that:

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The comment to Rule 23(b)(3) explicitly cautions against against use of the class action device in mass tort cases. *See* Advisory Committee Note to 1966 Revision of Rule 23(b)(3) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."). Moreover, most courts have denied certification in those circumstances. *See, e.g., In re Northern Dist. of Cal. Dalkon Shield IUD Products Liability Litigation,* 693 F.2d 847 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *Payton v. Abbott Labs.,* 100 F.R.D. 336 (D.Mass. 1983); *Yandle v. PPG Industries, Inc. 65 F.R.D. 566 (E.D.Tex. 1974); Boring v. Medusa Portland Cement Co.* 63 F.R.D. 78, 83-85 (M.D.Pa.), *appeal dismissed,* 505 F.2d 729 (3d Cir. 1974).

The present litigation justifies the prevalent skepticism over the usefulness of class actions in so-called mass tort cases and, in particular, claims for injuries resulting from

toxic exposure. First, the benefits of a class action have been greatly exaggerated by its proponents in the present matter. For example, much ink has been spilled in this case over the distinction between generic causation – whether Agent Orange is harmful at all, regardless of the degree or nature of exposure, and what ailments it may cause – and individual causation – whether a particular veteran suffers from a particular ailment as a result of exposure to Agent Orange. It has been claimed that the former is as issue that might appropriately be tried in a class action, notwithstanding that individual causation must be tried separately for each plaintiff if the plaintiff class prevails.

We do not agree. The generic causation issue has three possible outcomes: 1) exposure to Agent Orange always causes harm, 2) exposure to Agent Orange never causes harm; and 3) exposure to Agent Orange may or may not cause harm depending on the kind of exposure and perhaps on other factors. It is indisputable that exposure to Agent Orange does not automatically cause harm. The so-called Ranch Hand Study of Air Force personnel who handled and sprayed the herbicide proved that much beyond a shadow of a doubt in finding no statistically significant differences between their subsequent health histories and those of similar personnel who had not been in contact with Agent Orange. Further, defendants have conceded that some kinds of exposure to Agent Orange *may* cause harm. They stated at both the argument of the mandamus petition and the argument of the appeal that Agent Orange, like anything else, including water and peanuts, may be harmful. The epidemiological studies on which defendants rely so heavily prove no more than that Vietnam veterans do not exhibit statistically significant differences in various symptoms when compared with

other groups. They in no way exclude the possibility of injury, and tend at best to prove only that, if Agent Orange did cause harm, it was in isolated instances or in cases of unusual exposure.

The relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (e.g. state of health, lifestyle) and the nature of their exposure to Agent Orange. Although generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange thus appear to be inextricably intertwined, the class action would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure.

The second reason for our skepticism is that, with the exception of the military contractor defense, there may be few, if any, common questions of law. Although state law governs the claims of the individual veterans, *see In re "Agent Orange" Product Liability Litigation,* 635 F.2d at 993-95 (rejecting cause of action under federal common law), Chief Judge Weinstein decided that there were common questions of law because he predicted that each court faced with an Agent Orange case would resort to a national consensus of product liability law. Chief Judge Weinstein's analysis of the choice of law issues in this action, *see In re "Agent orange" Product Liability Litigation,* 580 F.Supp. 690 (E.D.N.Y. 1984), with which we assume familiarity, is bold and imaginative. However, in light of our prior holding that federal common law does not govern plaintiffs' claims, every jurisdiction would be free to render its own choice of law decision, and common experience suggests that the intellectual power of Chief

Judge Weinstein's analysis alone would not be enough to prevent widespread disagreement.

Third, the dynamics of a class action in a case such as this may either impair the ability of representative parties to protect the interests of the class or cause the inefficient use of judicial resources. These undesirable results stem from the fact that potential plaintiffs in toxic tort cases do not share common interests because of differences in the strength of their claims. Before the class is certified, it is usually some of the plaintiffs who seek certification and defendants who resist. This is so because many of the plaintiffs' counsel will perceive in class action efficiencies in discovery, legal and scientific research, and the funding of expenses. When counsel can reasonably expect to become counsel for the class and to share in a substantial award of fees, the incentive to seek certification is greatly enhanced. Defendants will resist certification, hoping to defeat the plaintiffs individually through application of their greater resources.

All plaintiffs may not desire class certification, however, because those with strong cases may well be better off going it alone. The drum-beating that accompanies a well-publicized class action claiming harm from toxic exposure and the speculative nature of the exposure issue may well attract excessive number of plaintiffs with weak to fanciful cases. For example, notwithstanding the grave doubt surrounding the factual basis of the plaintiffs' case, some 240,000 veterans and family members alleging hundreds of different ailments, including many that are both minor and commonplace, have filed claims for payment out of the settlement fund.

If plaintiffs with strong claims remain members of the class, they may see their claims diluted because a settle-

ment attractive to the defendants will in all likelihood occur. Weak plaintiffs, who may exist in very large numbers, stand to gain from even a small settlement Moreover, once a significant amount of money is on the table, the class attorneys will have an incentive to settle. They may well anticipate that the percentage of this money likely to be awarded as counsel fees will decline after a certain point. If they go to trial, on the other hand, they run the risk of losing the case and receiving no compensation for what may have been an enormous amount of work. There is thus great pressure to settle. Indeed, a settlement in a case such as the instant litigation, dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise. Such a settlement, however, is not likely to lead to a fund that can be distributed among the large number of class members who will assert claims and still compensate the strong plaintiffs for the value of their cases.

Moreover, the ability of the district court to scrutinize the fairness of the settlement is greatly impaired where the legal and factual issues to be determined in the class action are as numerous and complex as they were under the district court's order in the instant case. Similarly, the fashioning of a distribution plan that is both fair to the strong plaintiffs and efficient in adjudicating the large number of claims may be impossible. Only the weakness of the evidence of causation as to all plaintiffs and the strength of the military contractor defense enabled the district court to evaluate the settlement accurately and to fashion an appropriate distribution scheme in the instant matter. We regard those factors as largely coincidental and not to be expected in all toxic exposure cases.

If the strong plaintiffs opt out, however, the efficiencies of a class action may be negative. The class would then consist largely of plaintiffs with weak cases, many or most of which should never have been brought. The defendants would be unlikely to settle with the class because such a settlement with the class would not affect their continuing exposure to large damage awards in the individual cases brought by strong plaintiffs. Both the class action and the strong cases would then have to be tried.

Were this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error. However, we return to the cardinal fact we noted in denying the petition for writ of mandamus, namely that "the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war." *In re Diamond Shamrock Chemicals Co.*, 725 F.2d at 860. In that regard, Chief Judge Weinstein noted that:

> Unlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. The will include such matters as . . . that if any injuries were caused by defendants' product it was because of the particular use and misuse made by the government; and that the wholly responsible because the former knew of all possible dangers and assumed full responsibility for any damage . . . . It is anticipated that a very substantial portion of a prospective four-month trial will be devoted to just those defenses. Certification would be justified if only to prevent relitigating those defenses over and over again in individual cases.

Class Certification Opinion, 100 F.R.D. at 723.

In our view, class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense. First, this defense is common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2). *See Port Authority Police Benevolent Ass'n v. Port Authority of New York & New Jersey,* 698 F.2d 150, 154 (2d Cir. 1983) ("Since plaintiff has satisfied the requirement of a *common question* of law or fact, Rule 23(a)(2), the denial of class certification must be reversed.") (emphasis added). Second, because the military contractor defense is of central importance in the instant matter for reasons explained in our subsequent discussion of the fairness of the settlement and in our separate opinion affirming the grant of summary judgment against the opt-outs, this issue is governed by federal law, and a class trial in a federal court is a method of adjudication superior to the alternatives. Fed.R.Civ.P. 23(b)(3). If the defense succeeds, the entire litigation is disposed of. If it fails, it will not be an issue in the subsequent individual trials. In that event, moreover, the ground for its rejection, such as a failure to warn the government of a known hazard, might well be dispositive of relevant factual issues in those trials.

Appellants argue that the diverse interests of the class make adequate representation virtually impossible. We disagree. If defendants had successfully interposed the military contractor defense, they would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncrasies of their claims. Similarly, the typicality issue disappears because of the virtual identity of all of the plaintiffs' cases with respect to the military contractor defense.

It is true that some of the dynamics that generate pressure for an undesirable settlement will continue to operate in a class action limited to the military contractor defense. We believe, however, that a district court's ability to scrutinize the fairness of a class settlement is greatly enhanced by narrowing the legal and factual issues to this defense. We are confident, moreover, that such scrutiny will be informed by the court's awareness of the danger of such a settlement occurring. It is also true that the difficulty in fashioning a distribution scheme that does not overcompensate weak claimants and undercompensate strong ones is not alleviated by limiting the class certification to the military contractor defense. However, on balance we believe use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation and the military contractor defense was so strong.

We thus conclude that certification of the Rule 23(b)(3) class action was proper. Because our disposition of the appeals from the approval of the settlement and from the grant of summary judgment against the opt-outs excludes any possibility of an award of punitive damages, we need not address the propriety of the certification of a mandatory class under Rule 23(b)(1)(B).

4) *Adequacy of the Notice of the Class Action*

In addressing the defendants' petition for a writ of mandamus, we noted only that Chief Judge Weinstein's conclusion that the notice ordered was the best practicable under the circumstances was "if not inexorable, . . . arguably correct, at least before the full results [of the notice plan] are known." *In re Diamond Shamrock Chemicals Co.*, 725 F.2d at 862. Full review is now necessary.

Appellants argue that both the notice required by the district court, *see Class Certification Opinion,* 100 F.R.D. at 729-34, and the notice actually given were insufficent to inform the class members of their rights, most importantly their right to opt out. They contend therefore that the notice failed to meet the requirements of due process and Rule 23(c)(2) and seek an additional notification period as well as an additional opt-out period.

The portion of the order that dealt with notice, set out in full in the appendix, adopted a creative approach appropriate to this unique case. It required that letter notice be sent to the 92,275 veterans listed in the Agent Orange Registry established by the Veterans' Administration in 1978 to identify potential victims as well as to the 11,256 persons who had filed or intervened in lawsuits or had counsel affiliated with the PMC. The court concluded that these were the only class members who could be identified and located through reasonable effort. *Id.* at 729-31. The court also required various forms of substitute notice, including announcements in various servicepersons' and national publications and on radio and television. In addition, the court directed that a letter be sent to every governor requesting that notice of the lawsuit be provided to any state agencies that might have lists of veterans.

Rule 23, of course, accords considerable discretion to a district court in fashioning notice to a class, *see Reiter v. Sonotone Corp.,* 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979), and our standard of review is "the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424, 95 S.Ct. 2362, 2374-75, 45 L.Ed.2d 280 (1975) (discussing "abuse of discretion" standard in award of back pay under Title VII of Civil Rights Act of 1964).

See generally Anderson v. Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985) (elaborating on "clearly erroneous" standard).

Rule 23(c)(2) requires only that members of a Rule 23(b)(3) class be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Relying principally upon *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), appellants nonetheless contend that actual notice to each and every class member was essential. We disagree.

In *Mullane,* the Supreme Court held that notice by publication of pending settlements of accounts was constitutionally sufficient as to trust beneficiares whose names and addresses were unknown to the trustee. Noting the state's interest "in bringing any issues as to its fiduciaries to a final settlement," *id.* at 313, 70 S.Ct. at 657, and the beneficiary's interest in being apprised of the pendency of settlements in order to "choose for himself whether to appear or default, acquiesce or contest," *id.* at 314, 70 S. Ct at 657, the Court concluded that notice by publication was permissible as to persons whose whereabouts or interests could not be determined through due diligence or whose interests were either conjectural or future. *Id.* at 317-18, 70 S.Ct. at 658-59. It noted that where the performance of a trustee was the issue, the interests of unknown beneficiaries were likely to be protected by the known and notified beneficiaries, who had to be provided with mailed notice. The Court stated:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and

> the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

Id. at 319, 70 S.Ct. at 359. Appellants contend that, unlike *Mullane,* the interests of Agent Orange class members who were unaware of the instant litigation would not be protected by those class members who did receive notice.[4]

It is true that the claims of the plaintiffs are highly individualistic in a number of respects. The interests of all of the plaintiffs are identical, however, with regard to the facts and the law relevant to the military contractor defense. The class members with actual notice therefore would have represented the interests of the class members unaware of the action.

Moreover, Chief Judge Weinstein found that many of the members of the class were unknown and could not be located through reasonable efforts. That conclusion is a finding of fact, and must be accepted unless clearly erroneous. *In re Franklin National Bank Securities Litigation,* 599 F.2d 1109, 1110-11 (2d Cir. 1979). We cannot agree with appellants that all 2.4 million Vietnam veterans should have been sent letter notice. First, it is undisputed

[4] The PMC challenges appellants' standing to challenge any aspect of the settlement other than its substantive fairness. Master Brief of Appellee Plaintiffs' Management Committee at 66-67. It argues that appellants seek not to advance their own interests, but rather those of, for example, class members who did not receive notice. Due to our disposition of appellants' claims, we are not compelled to address this objection to standing and therefore do not do so.

that far fewer than that number were exposed to Agent Orange. A requirement that notice be given to all Vietnam veterans would thus have been considerably overbroad. Second, there is no assurance that such a list could have been compiled through reasonable efforts. Appellants claim that some records kept by the government would have facilitated individualized notice. They concede, however, that there was no easily accessible list of veterans, as there must have been of royalty holders in *Phillips Petroleum Co. v. Shutts,* U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), and of odd-lot trading customers in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). We cannot find, therefore, that such a comprehensive list could reasonably have been compiled.

We also note that the second phase of the plan enlisted the aid of the mass media and state governments, an effort that ultimately resulted in letter notice to 20,000 class members in addition to the more than 100,000 given notice in the first phase of the plan. We also take judicial notice of the widespread publicity this litigation has received. Given the great doubt as to whether anyone at all was injured by Agent Orange, the fact that some 240,000 claims have been filed suggests that no practical problem exists as to the adequacy of the notice.

Appellants offer no feasible alternative to the notice plan adopted by the district court for identifying and contacting persons actually exposed to Agent Orange. In this regard, we are informed by the statement of our late colleague Judge Friendly that it is inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us."

Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied,* 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983). In sum, the notice plan adopted by Chief Judge Weinstein was fully adequate under the circumstances.

Appellants also raise numerous objections to the content of the notice given. They contend, for example, that there were discrepancies among the various notices as to whether the class consisted of persons who "claim injury," "were injured," or "can claim injury" from Agent Orange. Such objections provide no basis for us to require the sending of new notice, however, because the essential goal of the notice requirement would have been accomplished by any of the above formulations. Anyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel.

Finally appellants point out that a large number of mailed notices were returned undelivered. In litigation of this sort, such returns must be regarded as inevitable. They also note the alleged failure of class counsel to ensure that all of the publication and broadcast notices were provided in a timely fashion. These omissions occurred in part because of a clerical misunderstanding regarding a stay we granted after denial of the defendants' mandamus petition. *See Settlement Opinion,* 597 F.Supp. at 756. Moreover, a major effort was made to disseminate notice through the media, and we are convinced that the omissions noted were of little consequence in light of the actual notice and widespread publicity.

5) *Adequacy of Post-Settlement Procedures*

Appellants argue that Chief Judge Weinstein should have conducted hearings to evaluate the adequacy of the settlement prior to ordering notice of the settlement to the class. We have previously noted in addressing a similar argument that "[t]he question becomes whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold and additional hearing on the settlement or to give appellants authority to renew discovery." *Grinnell I,* 495 F.2d at 462-63. Although appellants have stated in attacking the settlement that Chief Judge Weinstein was *too* involved in its negotiation, they argue here that he did not know enough about the settlement to assess its reasonableness. Their argument is totally frivolous. Chief Judge Weinstein was throughly informed of the strengths and weaknesses of the parties' positions. No hearing was necessary, therefore.

Appellants also challenge the validity of the notice of settlement sent to class members. They allege, *inter alia,* that the notice was defective because it failed to detail a distribution plan. There is, however, no absolute requirement that such a plan be formulated prior to notification of the class. *See In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 223-23 (5th Cir. 1981), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982).

The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does

not affect the obligation of the defendants under the settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished. Moreover, if a hearing on a settlement must follow formulation of a distribution plan, then reversal of any significant aspect of the plan on appeal, as has occurred in the instant case with regard to the establishment of a foundation, would require a remand for reconsideration of the settlement, followed by yet another appeal. There is no sound reason to impose such procedural straitjackets upon the settlements of class actions. Finally, we note that Chief Judge Weinstein's approval of the settlement was subject to formulation of and hearings on a plan for distribution.

6) *Adequacy of the Settlement*

As required by Fed.R.Civ.P. 23(e), Chief Judge Weinstein carefully reviewed the proposed settlement, and gave his approval subject to hearings on attorneys' fees and approval of a settlement fund distribution plan. *See Settlement Opinion,* 597 F.Supp. 740 (E.D.N.Y. 1984). He stated:

> The court has been deeply moved by its contact with members of the plaintiffs' class from all over the nation and abroad. Had this court the power to rectify past wrongs — actual or perceived — it would do so. But no single litigation can lift all of plaintiffs' burdens. The legislative and executive branches of government — state and federal — and the Veterans Administration, as

> well as our many private and quasipublic medical and social agencies, are far more capable than this court of shaping the larger remedies and emotional compensation plaintiffs seek.
>
> Within the sharply limited judicial role we must ask whether the settlement of the litigation proposed by the parties' representatives is acceptable. For the reasons indicated below we tentatively hold that it is. It gives the class more than it would likely achieve by attempting to litigate to the death. It provides funds to help at least some men, women and children whose hardships will be reduced in some small degree. It does represent a major step in the essential process of reconciliation among ourselves.

Id. at 747.

Our role in scrutinizing the approval of the settlement is limited in light of the district court's extensive knowledge of the parties and their respective cases. As we stated in *Grinnell I,* "so much respect is accorded the opinion of the trial court in these matters that this court will intervene in a judicially approved settlement only when objectors to that settlement have made a clear showing that the District Court has abused its discretion." 495 F.2d at 455 (citations omitted). We also noted that "[t]he proposed settlement cannot be judged without reference to the strength of plaintiffs' claims," and that "[i]f the settlement offer was grossly inadequate . . . it can be inadequate only in light of the strength of the case presented by the plaintiffs." *Id.*

Appellants argue that the $180 million settlement approved by the district court is woefully inadequate. They contend that the PMC underestimated the strength of the class' case, the total number of claimants, the number with serious claims, and the value of these claims had they been presented to juries. They assert that the principal PMC negotiator estimated that there were only about 20,000

claims, 3,000 of which were serious in nature. Appellants' own estimate is that there are at least 20,000 serious claims, each worth at least $500,000. Appellants seek to bolster their position by noting that 240,000 veterans have filed claims against the settlement fund.

We view the lack of hard informatoin as to the number of "serious" claims – apparently a reference to the amount of damage suffered since no individual Agent Orange claim is strong on liability – as a sign of the weakness of the plaintiffs' case. Those who challenge the settlement, including counsel who have been involved in the litigation for many years, continue merely to speculate about the number of serious claims. That fact supports rather than undermines the settlement.

We are also unimpressed by the use of the total number of claimants as a means of attacking the settlement. The 240,000 claimants specify hundreds of different ailments, some of which, such as anxiety or fatigue, are so common that causation by Agent Orange simply cannot be proved. Moreover, the existence of such a large number of claimants proves nothing. For example, thousands of birth defects in the children of Vietnam veterans exposed to Agent Orange would not statistically differentiate that group from the population generally. *See Settlement Opinion,* 597 F.Supp. at 789 (quoting JAMA editorial by Bruce B. Dan, M.D.). The irrelevance of the number of claimants results from the fact that every Vietnam veteran who might have been exposed to Agent Orange was invited to file a claim regarding any and all "adverse health effects." 597 F.Supp. at 869.

Nevertheless, tort law accords juries wide discretion, and the existence of any substantial number of serious plaintiffs would create a dangerous exposure for the chemical companies. It is true that $180 million is a lot of money. If even a small number of plaintiffs had gone on to prevail at trial, however, the actual exposure of the

chemical companies might well have been measured instead in the billions of dollars. Jury verdicts of several million dollars for disabling ailments or injuries to children are not uncommon. If, in the present litigation, each serious claim had a settlement value of $500,000, the $180 million would cover only 360 plaintiffs. Indeed, the $180 million is at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay to their lawyers had they continued the litigation. However large a sum $180 million may be, therefore, we must conclude that in the circumstances it was essentially a settlement at nuisance value.

We believe, however, that the PMC had good reason to view this case as having only nuisance value. Chief Judge Weinstein's opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail, *Settlement Opinion,* 597 F.Supp. 740 (E.D.N.Y. 1984), and our discussion assumes familiarity with that opinion.

The difficulties begin with the conceded fact that all of the various ailments afflicting the plaintiffs occur in the population generally and have known and unknown causes other than exposure to dioxin. *Id.* at 782-83. Studies based on industrial accidents and experiments with animals suggest that exposure to dioxin may cause various of those ailments. *Id.* at 780. However, these studies involve different dosages and different species than are involved in this litigation. Studies of Vietnam veterans themselves fail to demonstrate ailments occurring among them at a statistically abnormal rate. *See id.* at 787-88. The weight of present scientific evidence thus does not establish that personel serving in Vietnam were injured by Agent Orange. *See* III *Review of Literature on Herbicides, Including Phenoxy Herbicides and Associated Dioxins,* II-8 to II-10 (1980) (Joint Appendix Vol. XIII at 5828-29).

The Ranch Hand Study compared health records of Air Force personnel involved in handling and spraying Agent

Orange with those of Air Force personnel who performed other tasks. It concluded that there is little difference in the health histories of the two groups. *See* 597 F.Supp. at 782, 784, 788. Other studies, including many done by federal, state, and foreign governments, compared the incidence of various ailments among Vietnam veterans to their incidence among civilian populations. These studies also concluded there are no statistically significant differences. *See id.* at 787-95.

Such studies are, of course, not conclusive. The Ranch Hand Study, for example, involved personnel who ate and slept at their home bases and were able to take regular showers, whereas the plaintiffs were predominantly infantry alleging exposure to Agent Orange through spraying or ingestion of local food and water. *Id.* at 788 Atlhough it is by no means clear that the plaintiffs suffered greater exposure than did the Air Force personnel who actually handled the herbicide, the circumstances of exposure were clearly different. There are, moreover, some inconclusive anomalies in the Ranch Hand findings. *Id.*

Conclusions as to the effects of Agent Orange reached by studies comparing Vietnam veterans with civilians are weakened by the fact that portions of the civilian population may also have been exposed to dioxin. *See id.* at 782 ("as one expert put it, 'all of us have probably been exposed to dioxin at some time'"). The similar incidence of diseases in the two groups thus does not absolve Agent Orange. Nevertheless, the facts that the studies do not exclude the possibility of injury and that evidence of such injury may someday be found cannot obscure the paucity of present evidence that Agent Orange injured the plaintiffs. Indeed, plaintiffs' own evidence of dioxin's toxicity partly undermines their case. That evidence establishes that chloracne is a leading indicator of harmful exposure to dioxin, yet verified cases of chloracne among Vietnam veterans are rare. *Id.* at 794-95.

At bottom, the individual veterans' cases would consist of oral testimony that each had been in an area where Agent Orange was used, that studies of industrial accidents and animal experiments show that dioxin is harmful, and that the plaintiff suffers from a particular ailment. Medical testimony would indicate a causal relationship. The defendants' case would consist largely of evidence that each of these ailments has many unknown causes, that most of the ailments usually cannot be attributed to a particular cause, and that each exists among many persons not exposed to Agent Orange. As a concrete example, a plaintiff might testify to presence in an area in South Vietnam where Agent Orange was used and development of a cancer some years later. Medical testimony would again indicate a causal relationship. The defendants would show that thousands of similar cancers without traceable cause are statistically predictable among persons not exposed to Agent Orange and that no greater incidence of such cancer has been found among Vietnam veterans than among the population generally.

The problems of proving causation are thus substantial. This is illustrated by the scientific evidence offered by the opt-outs in response to the defendants' motion for summary judgment.[5] *See Opt-Out Opinion*, 611 F.Supp. 1223; *In re "Agent Orange" Product Liability Litigation (Lilley v. Dow Chemical Co.)*, 611 F.Supp. 1267 (E.D.N.Y. 1985) (individual opt-out claim brought by veteran's widow). Their experts relied heavily upon studies of industrial accidents and animals that are of marginal relevance to this case. *See Opt-Out Opinion*, 611 F.Supp.

[5] This evidence came into the record after approval of the settlement. Because it supports appellants' positions, they are not prejudiced by our consideration of it.

at 1236, 1238. Also some of the expert opinions as to individual causation were often highly tentative or subject to impeachment. *See Lilley v. Dow Chemical Co.,* 611 F.Supp. at 1273; *Opt-Out Opinion,* 611 F.Supp. at 1236-38, 1252-54, 1265-66.

The factual weakness of the plaintiff's case is further revealed by the difficulty of proving details about exposure to Agent Orange. The events in question occurred many years ago, and exposure through ingestion of water or food is a matter of considerable speculation. Nevertheless, given the nature of the scientific evidence, the character of exposure is a critical element.

Plaintiffs also face formidable legal problems in establishing liability. Each plaintiff would encounter a choice of law issue that might be resolved adversely to his or her claim. As Chief Judge Weinstein recognized, the substantive law of product liability varies from state to state, and the question of which state's law would apply to a particular case is not easily answered. *See* 580 F.Supp. 690, 693-701 (E.D.N.Y.1984). *See also Class Certification Opinion,* 100 F.R.D. 718, 724 (E.D.N.Y.1983). No single state has an overriding interest in this litigation because the alleged injuries resulted from exposure to toxic materials in a foreign country while the veteran plaintiffs were serving in the armed forces. Chief Judge Weinstein concluded that each tribunal addressing a claim by an individual plaintiff would apply a national consensus law. 580 F.Supp. at 713. Viewed as an academic discussion of an interesting choice of law problem, his analysis is, as we noted, bold and imaginative. Viewed as a prediction of what particular jurisdictions would do in individual cases, however, his conclusion is patently speculative. Moreover, even if a national consensus law were developed and ap-

plied, there is no guarantee that it would be favorable to the plaintiffs.

Other legal problems facing the plaintiffs concern the applicability of various state statutes of limitations. These were discussed in detail by Chief Judge Weinstein in his opinion approving the settlement, 597 F.Supp. 740, 800-816 (E.D.N.Y.1984), and we have little to add to that discussion other than to express skepticism that all plaintiffs would overcome the defense that their claims were time barred.

Finally, the plaintiffs might have difficulty establishing the liability of any particular defendant because each defendant's version of Agent Orange contained different amounts of dioxin and because the government mixed the products of the various manufacturers in unmarked barrels. It is therefore impossible to attribute the exposure of an individual to Agent Orange to the product of a particular company. It is possible, moreover, that only the herbicide with the greater amounts of dioxin was hazardous. As Chief Judge Weinstein noted in his opinion, *id.* at 819-33, various legal theories might enable plaintiffs to establish liability against each manufacturer, but there is no guarantee that any of these theories would be adopted.

The plaintiffs had a final and in our view impossible, hurdle to surmount, namely the military contractor defense. The detailed elaboration of our views of that defense can be found in the opinion that discusses the opt-outs' appeal from the grant of summary judgment. We need note here only that in affirming the grant of summary judgment against the opt-outs, we act on our belief that defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange.

First, we agree with Chief Judge Weinstein that a reasonable trier of fact would have to have found that during the time when the defendants had a duty to inform the government of known hazards, the government had as much knowledge as the defendants of the dangers of dioxin, then relating largely to chloracne and a rare liver disease. *See Opt-Out Opinion,* 611 F.Supp. at 1263. Second, we believe that the military contractor defense shields defendant contractors from liability where the hazard is wholly speculative. Even if this were a case in which causation ws now clear and the issue was whether the hazard was known when Agent Orange was sold to the government, the plaintiffs would have difficulty establishing a breach of a duty to inform. Establishing such a duty on the facts here is impossible, however. In the light of hindsight, some 15 to 20 year after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards.

We conclude that all the plaintiffs in this litigation faced formidable hurdles. The settlement was therefore reasonable. We reach this conclusion even though we recognize that the PMC's fee agreement created a conflict of interest that generated impermissible incentives on the part of class counsel to settle, as set forth in Judge Miner's companion opinion. Whatever effect the invalidation of that agreement might have had on a settlement in a strong liability case, it does not affect the instant settlement because of the grave weaknesses in plaintiff's case.

Affirmed.

APPENDIX

Chief Judge Weinstein's order with respect to notice to the members of the class provided as follows:

(a) Plaintiffs' counsel, at their own expense, shall cause a copy of the written notice, attached as Exhibit A, to be mailed by first class United States mail to all persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention. Mailing of the notice shall take place within 30 days of this Order.

(b) Plaintiffs' counsel, at their own expense, shall cause to be mailed a copy of the written notice to all persons who are currently listed on the United States Government's Veterans Administration "Agent Orange Registry." This mailing shall take place within 50 days of this Order.

(c) Notice shall be mailed in envelopes that are printed only with the names of the addressee and the Clerk of this Court. Plaintiffs' counsel shall maintain a record of the name and address of each person to whom the notice is mailed. The record shall be filed with the Clerk of the Court not later than 70 days after the issuance of this Order.

(d) Plaintiffs' counsel, at their own expense, shall obtain a post office box in Smithtown, New York, 11787, in the name of the Clerk of the Court, and advise the court and the parties of the box number not later than 15 days after

the issuance of this Order. The box shall be rented until further order of the court. Plaintiffs' counsel shall on a daily basis review the contents of the post office box and prepare a listing of all exclusion requests received, which shall be available to the court and the parties for inspection and copying, together with the exclusion requests. Plaintiffs' counsel shall send a copy of the notice and the exclusion request form to each person who writes to the Clerk of the Court requesting them. Each day plaintiffs' counsel shall transmit to the court and the parties copies of any communications (other than exclusion requests or requests for forms) that are received at the post office box. Plaintiffs' counsel shall maintain a record, together with the orignals, of all mail returned as undelivered.

(e) Plaintiffs' counsel, at their own expense, shall serve a radio and television announcement notice in the form of Exhibit B on the nationwide networks of the American Broadcasting Company, the Columbia Broadcasting System, the Mutual Broadcasting System, the National Broadcasting Company, and the Public Broadcasting and Television Networks and on radio stations with a combined coverage of at lesat 50 percent of the listener audience in each of the top one hundred radio markets in the United States within 50 days of this Order.

Along with the radio and television notice served upon the nationwide radio and television broadcating systems and radio stations, plaintiffs' counsel shall request that the notice be read as set forth in Exhibit B without interruption or comment, either alone or in conjunction with the showing on television of the text of Exhibit B. Plaintiffs' counsel shall request that each participating radio and television broadcasting station advise them of the dates and times at which the notice was broadcast or shown.

Within 90 days of this Order, plaintiffs' counsel shall furnish to the court and the parties a report identifying the name and location of each radio station broadcasting the announcement, if known, and the date and time of each announcement. The court will then determine if further notice is required.

(f) Plaintiffs' counsel, at their own expense, shall publish in the following newspapers and magazines an announcement in two successive weeks (but if publication is monthly, only once) in the form of Exhibit C: the nationwide edition of *The New York Times, U.S.A. Today, Time Magazine, the American Legion Magazine, VFW Magazine, Air Force Times, Army Times, Navy Times,* and the *Leatherneck;* the ten largest circulation newspapers in Australia, including *The Australian;* and the five largest daily circulation newspapers in New Zealand, including *The Dominion.* Publication shall be completed as soon as practicable, but no later than March 1, 1984. The size of the notice shal be not less than one-eighth, nor more than one-third, of the newspaper or magazine page.

(g) Plaintiffs' counsel shall, at their own expense, obtain a toll-free "800" telephone number in the name of the Clerk of the Court. The number shall be in effect no later than January 1, 1984 to at least May 1, 1984. The number shall be manned on a daily basis, from at least Monday to Friday, 9:00 a.m. to 5:00 p.m., E.S.T., with knowledgeable persons (or a recorded announcement and recording device) who shall tell callers where to write for further information, but who shall not give advice concerning rights and responsibilities in this litigation. A record of those calling and giving their names and addresses shall be kept. Those requesting a copy of Exhibt A shall be sent one. No oral exclusion request shall be taken. Plaintiffs' counsel shall give written instructions to those answering the phone.

A copy of such instructions and any recorded announcement shall be filed with the Clerk.

(h) The Clerk of the Court shall send this order and notice to the Governor of each of the states of the United States. He shall respectfully request each Governor to refer the notice to any state organization created by the executive or legislative branches dealing with the problems of Vietnam vetrans and request that the notice be sent to all those known Vietnam veterans who may be members of the class described in the Order, or that a list of names and addresses be supplied to this court so that notice may be mailed by the plaintiffs' counsel. The Clerk shall respectfully request a list of those to whom notice has been sent by any state agency.

* * * * * *

Exhibit A

LEGAL NOTICE TO CLASS MEMBERS
OF PENDENCY OF CLASS ACTION

This notice is given to you pursuant to an Order of the United States District Court for the Eastern District of New York and Rule 23(c)(2) of the Federal Rules of Civil Procedure. It is to inform you of the pendency of a class action in which you may be a member of the class, and of how to request exclusion from the class if you do not wish to be a class member. None of the claims described below have been proven. It is contemplated that a trial by court and jury will take place in this court beginning in May, 1984.

1. There are now pending in the United States District Court for the Eastern District of New York claims brought by individuals who were in the United States, New Zealand, or Australian Armed Forces assigned to or near Viet-

nam at any time from 1961 to 1972, who allege personal injury from exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenozo-p-dioxin (collectively referred to as "Agent Orange").

2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the servicepersons who claim direct or derivative injury as a result of exposure. Plaintiffs include children asserting claims in their own right for genetic injury and birth defects caused by their parents' exposure to "Agent Orange" and other phenoxy herbicides. Wives of veterans exposed to "Agent Orange" in Vietnam seek to recover in their own right for miscarriages. Plaintiffs' theories of liabililty include negligence, strict products liability, breach of warranty, intentional tort and nuisance. Damage claims of family members include pecuniary loss for wrongful death, loss of society, comfort, companionship, services, consortium, guidance and support. In addition, plaintiffs seek punitive damages for defendants' alleged misconduct in furnishing herbicides to the United States Government.

3. The defendants, who are alleged to have manufactured or sold "Agent Orange" to the United States Government, are Dow Chemical Company, Monsanto Company, T.H. Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated, and Thompson Chemical Corporation. All the defendants deny that the plaintiffs' alleged injuries were in any way caused by "Agent Orange." They assert that injury, if any, was not caused by a product produced by them. The defendants have challenged these suits on various other grounds including plaintiffs' lack of standing to sue, lack of jurisdiction, statutes of limitation, insufficien-

cy in law, plaintiffs' contributory negligence, and plaintiffs' assumption of known risks. Each has also asserted such affirmative defenses as the "government contract defense" and the Government's misuse of its product. In third-party complaints, the defendants asserted claims against the United States of America seeking indemnification or contribution in the event the defendants are held liable to the plaintiffs. The Government has asserted its power to prevent anyone from suing it.

4. This Court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of those persons who were in the United States, New Zealand, or Australian Armed Forces assigned to Vietnam at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The court may reconsider this decision, by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case. The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

5. The court has also certified a Rule 23(b)(1)(B) class limited to claims for punitive damages. The class includes the same persons as are in the Rule 23(b)(3) class. The court has decided not to permit members of the class to seek exclusion on the issue of punitive damages. You will

therefore be bound by the court's rulings on punitive damages whether or not you seek exclusion on the issue of compensatory damages.

6. Trial of the representative plaintiffs' claims is scheduled to commence before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, and a jury on May 7,1984.

7. If you are a member of the plaintiff class you will be deemed a party to this action for all purposes unless you request exclusion from the Rule 23(b)(3) class action covering compensatory damages.

8. If you do not request exclusion from the class by May 1, 1984, you will be considered one of the plaintiffs of this classs action for all purposes. You may enter an appearance through counsel of your own choice. You will be represented by counsel for the class representatives unless you choose to enter an appearance through your own legal counsel.

9. Class members who do not request exclusion will receive the benefit of, and will be bound by, any settlement or judgment favorable to the class covering compensatory damages. The class representatives' attorneys fees and costs will be paid out of any recovery of compensatory and other damages obtained by the class members. You will not be charged with costs or expenses whether or not you remain a member of the class. However, if you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel.

10. Class members who do not request exclusion will be bound by any judgment adverse to the class, and will not have the right to maintain a separate action even if they have already filed their own action.

11. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

12. *If you wish to be excluded from the class for compensatory damges, you must sumbit a written request for exclusion.* For your convenience, the request for exclusion may be submitted on the attached form, entitled "Request for Exclusion." If you received this notice by mail, a Request for Exclusion form should have accompanied it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of the Court, P.O. Box ____, Smithtown, New York 11787. A written Request for Exclusion may be submitted without using the Request for Exclusion form, but it must refer to the litigation as "In re 'Agent Orange' Product Liability Litigation, MDL No. 381": include your name and address in your statement requesting exclusion. Any request for exclusion must be received on or before May 1, 1984 by the Clerk of the United States District Court for the Eastern District of New York at Post Office Box ____, Smithtown, New York 11787 or at a federal courthouse in the Eastern District of New York.

13. Under the court's Order, all potential plaintiffs are deemed to be members of a Rule 23(b)(1)(B) class on the issue of punitive damages. At the time of trial the court will determine whether the facts presented warrant the submission of a punitive damage claim to the jury. In the event that there is a recovery for punitive damages, it will be shared by those plaintiffs who are successful in prosecuting their claims in this or other suits on a appropriate basis to be determined by the court. If you choose to exclude yourself from this class action on the issue of compensatory damages, you may do so without necessarily losing your right to share in any punitive damages.

14. The plaintiffs in this class action are represented by a group of attorneys who have been tentatively approved by the Court as the Agent Orange Plaintiffs' Management Committee. Members of this committee include:

Phillip E. Brown, Esq.
Hoberg, Finger, Brown,
Cox & Molligan
703 Market St. (18th Floor)
San Francisco, CA 94103

Stanley M. Chesley, Esq.
Waite, Schneider, Bayless
and Chesley Co., L.P.A.
1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, Ohio 45202

David J. Dean, Esq.
Dean, Falanga & Rose
One Old Country Road
Carle Place, New York 11514

Newton B. Schwartz, Esq.
Houston Bar Center Building
722 Main (Suite 325)
Houston, Texas 77002

Thomas W. Henderson, Esq.
Baskin & Sears
Frick Building (10th Fl.)
Pittsburgh, PA 15219

Benton Musslewhite
Genton Musslewhite, Esq. &
John O. O'Quinn, Esq.
609 Fannin (Suite 517)
Houston, Texas 77002

Stephen J. Schlegel, Esq.
Schlegel & Trafelet, Ltd.
One North LaSalle Street
Suite 3900
Chicago, Illinois 60602

David J. Dean, Esq. has been designated by the court as plaintiffs' spokesman. The Management Committee is being aided in its duties of representing the interests of the plaintiffs by other law firms in the United States and abroad.

15. *Examination of pleadings and papers.* This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, you or your counsel may review the pleadings and other papers filed at the office of

the Clerk of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, on any business day from 9:00 a.m. to 5:00 p.m.

16. *Interpretation of this Notice.* Except as indicated in the orders and decisions of the United States District Court for the Eastern District of New York, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required should you desire to be excluded from the class, the court's certification of the class, and the forthcoming trial.

Robert C. Heinemann
Clerk, United States District
Court for the Eastern Districdt
of New York

DATED: Brooklyn, New York
January 12, 1984

EXCLUSION REQUEST FORM

Clerk
United States District Court
for the Eastern District of New York
P.O. Box ____
Smithtown, New York 11787

Re: In re "Agent Orange" Product Liability
Litigation MDL No. 381

I hereby request to be excluded from the class action in the above-captioned matter.

_____
(signature)

Name (print): _____

Address: _____

If not a member of the armed forces who served in or near Vietnam, how are you related to such a serviceperson? _____

_____

Armed Forces unit of serviceperson _____

Armed Forces identifying number of serviceperson _____

Period of service in or near Vietnam _____

I learned about this suit by _____

_____

Exhibit B

(Radio and Television Communication)

SPECIAL ANNOUNCEMENT

Were you or anyone in your family on military duty in or near Vietnam at any time from 1961 to 1972? If so, listen carefully to this important message about a pending "Agent Orange" lawsuit that may affect your rights.

If you or anyone in your family claim injury, illness, disease, death, or birth defect as a result of exposure to "Agent Orange," or any other herbicide in or near Vietnam at any time from 1961 to 1972, you are now a member of a class in an action brought on your behalf in the United Staes District Court for the Eastern District of New York, unless you take steps to exclude yourself. The class is limited to those who were injured by exposure to Agent Orange or any other herbicide while serving in the armed forces in or near Vietnam at any time from 1961 to 1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit. It has ordered that this message be transmitted to give as many persons as is practicable notice of this suit.

For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-____, or write to the Clerk of the United States District Court, Box ____, Smithtown, New York 11787. That address again is Clerk of the United States District Court, P.O. Box ____, Smithtown, New York 11787, or call 1-800-____.

EXHIBIT C

(Newspaper and Magazine Notice)

TO ALL PERSONS WHO SERVED IN OR NEAR VIETNAM AS MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, AUSTRALIA AND NEW ZEALAND FROM 1961-1972

If you or anyone in your family can claim injury, illness, disease, death or birth defect as a result of exposure to "Agent Orange" or any other herbicide while assigned in or near Vietnam at any time from 1961 to 1972, you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York unless you take steps to exclude yourself from the class. The class is limited to those who were injured by exposure to "Agent Orange" or any other herbicide while serving in the armed forces in or near Vietnam at any time during 1961-1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses on opinion as to the merit or lack of merit of the lawsuit. 100 F.R.D. at 729-35.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION MDL NO. 381.

Nos. 1085, 1095 and 1104, Dockets 85-6163, 85-6269 and 85-6337.

United States Court of Appeals, Second Circuit.

Argued April 9, 1986.
Decided April 21, 1987.

* * * * *

Before VAN GRAAFEILAND, WINTER, and MINER, Circuit Judges.

WINTER, Circuit Judge:

This opinion addresses the disposition of 287 appeals in cases brought by plaintiffs who chose to opt out of the Agent Orange class action. These cases remained in the Eastern District of New York after the class settlement as a result of the multidistrict referral. Chief Judge Weinstein granted summary judgment against each of the optout plaintiffs, most of whom now appeal.[1] To avoid repetition, this opinion assumes familiarity with the discussion of the fairness of the settlement in the first of this series of opinions, 818 F.2d 145, and with Chief Judge Weinstein's opinions reported at: 597 F.Supp. 740, 775-99, 819-50 (E.D.N.Y.1984) (*Settlement Opinion*"); 611 F.Supp. 1223

[1] The appellants include Anna M. Lilley, an opt-out plaintiff against whom summary judgment was granted in a separate opinion. *See In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1267 (E.D.N.Y. 1985) ("*Lilley Opinion*").

(E.D.N.Y.1985) (*"Opt-Out Opinion"*); and 611 F.Supp. 1267 (E.D.N.Y.1985) (*"Lilley Opinion"*).

After they had settled with the class, the defendant chemical companies moved for summary judgment against the opt-out plaintiffs. Chief Judge Weinstein granted the motion on the alternative dispositive grounds that no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange, *see Opt-Out Opinion,* 611 F.Supp. at 1260-63; *Lilley Opinion,* 611 F.Supp. at 1284-85, that no plaintiff could prove which defendant had manfuactured the Agent Orange that allegedly caused his or her injury, *see Opt-Out Opinion,* 611 F.Supp. at 1263; *Lilley Opinion,* 611 F.Supp. at 1285, and that all the claims were barred by the military contractor defense. *See Opt-Out Opinion,* 611 F.Supp. at 1263-64; *Lilley Opinion,* 611 F.Spp. at 1285.

The district court's determination that individual causation could not be proven was based largely on its conclusion that the expert opinions submitted by the opt-out plaintiffs were inadmissible. Chief Judge Weinstein held that the opinions lacked a reliable basis and were therefore inadmissible under Fed.R.Evid. 703.[2] *See Opt-Out Opinion,* 611 F.Supp. at 1243-55; *Lilley Opinion,* 611 F.Supp. at 1280-83. He also found that the opinions were so unreliable that the danger of prejudice substantially outweighed their probative value under Fed.R.Evid. 403.[3] *See Opt-*

[2] Fed.R.Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[3] Fed.R.Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confu-

Out Opinion, 611 F.Supp. at 1255-56; *Lilley Opinion,* 611 F.Supp. at 1283.

The district court's determination that no plaintiff could prove which defendant caused his or her particular illness was based on the undisputed facts that the amount of dioxin in Agent Orange varied according to its manufacturer and that the government often mixed the Agent Orange of different manufacturers and always stored the herbicide in unlabeled barrels. *See Opt-Out Opinion,* 611 F.Supp. at 1263 (citing *Settlement Opinion,* 597 F.Supp. at 816-44). The court also rejected *sub silentio* various theories of enterprise and alternative liability that it had discussed in evaluating the settlement. *See Settlement Opinion,* 597 F.Supp. at 820-28. We do not address either of these grounds for the grant of summary judgment because we affirm on the military contractor defense.[4]

The district court granted summary judgment on military contractor grounds because it found no genuine factual dispute as to whether the government possessed as much information as the chemical companies about possible hazards of Agent Orange at pertinent times. *See Opt-Out Opinion,* 611 F.Supp. at 1263. This informtion concerned an association between dioxin exposure and cases of chloracne and liver damage. We agree with the district court that the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies. We add a further reason for affirming the grant of summary judgment bas-

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sion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[4] Twenty-eight appellants made no evidentiary submission in response to the motion for summary judgment. We affirm those appeals on causation as well as military contractor grounds.

ed on the military contractor defense. Even today, the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam, even with regard to chloracne and liver damage. The chemical companies therefore could not have breached a duty to inform the government of hazards years earlier.

Our consideration of the military contractor defense has been greatly impaired by the inexplicable and unjustifiable failure of the opt-outs' counsel to brief the issue even though it was a dispositive ground for the grant of summary judgment.[5] On appeal, their brief offers only the conclusory statement that "[t]he district court clearly committed error in holding that the government contract defense presented no genuine issues of material fact." We are then referred to 569 pages of deposition excerpts and documents, which are said to "raise clear questions of material fact."[6] No explanation is given of the relevance of these materials, however, and we are left in ignorance of appellants' view of the legal contours of the defense. Appellees, having no discussion to which they might respond, also do not address the issue.

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[5] Counsel have also failed to brief the second ground for granting summary judgment, the indeterminate defendant issue.

[6] The opt-outs' brief states in a footnote:

> Plaintiff have placed in the appendix a number of documents and deposition excerpts which were submitted in opposition to defendants' motions for summary judgment [sic]. Those documents and deposition excerpts raise clear questions of material fact. The Court's attention is respectfully commended to JA.1717-24, 1759-1808, 2019-2356, 2392-2560, 2568-71. Plaintiffs regret that page constraints do not permit further comment on those documents. *See*, Master Class Action Brief, pp. 69-70.

We cannot agree that an editing of this 75-page brief, which can hardly be described as tightly written, would not have permitted a discussion of the military contractor issue.

We believe that federal law shields a contractor from liability for injuries caused by products ordered by the government for a distinctly military use, so long as it informs the government of known hazards or the information possessed by the government regarding those hazards is equal to that possessed by the contractor. The military contractor defense has been the subject of several recent judicial decisions, *see Boyle v. United Technologies Corp.*, 792 F.2d 413, 414-15 (4th Cir.1986), *cert. granted*, ____ U.S. ____, 107 S.Ct. 872, 93 L.Ed.2d 827 (1987); *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir.1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529); *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir.1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596-600 (7th Cir.1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3d Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985); *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444 (9th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984), and has figured prominently in the instant litigation, *see In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861 (2d Cir.), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984); *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. at 847-50; 580 F.Supp. 690, 701-05 (E.D.N.Y. 1984); 565 F.Supp. 1263 (E.D.N.Y.1983); 534 F.Supp. 1046, 1053-58 (E.D.N.Y. 1982); 506 F.Supp. 762, 792-96 (E.D.N.Y.1980). Our rationale for the defense is similar to that recently expressed by the Court of Appeals for the Fourth Circuit:

> Traditionally, the government contractor defense shielded a contractor from liability when acting under the direction and authority of the United States. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20,

> 60 S.Ct. 413, 414, 84 L.Ed. 554 (1940). In its original form, the defense covered only construction projects, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir.1983), *cert. denied,* 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). Its application to military contractors, however, serves more than the historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government. It advances the separation of powers and safeguards the process of military procurement.

Tozer, 792 F.2d at 405.

Subjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and institutional competence. *See Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.") (emphasis in original). The allocation of such decisions to other branches of government recognizes that military service, in peace as well as in war, is inherently more dangerous than civilian life. Civilian judges and juries are not competent to weigh the cost of injuries caused by a product against the cost of avoidance in lost military efficiency. Such judgments involve the nation's geopolitical goals and choices among particular tactics, the need for particular technologies resulting therefrom, and the likely tactics, intentions, and risk-averseness of potential enemies. Moreover, military goods may utilize advanced technology that has not been fully tested. *See McKay,* 704 F.2d at 449-50 ("in setting specifications for

military equipment, the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods"). Whereas judges and juries may demand extensive safety testing for goods marketed in the civilian sector, such testing could impose costs and delays inconsistent with military imperatives.

The procurement process would also be severely impaired if military contractors were exposed to liability for injuries arising from the military's use of their products. Military contractors produce goods for the government according to specifications provided by the government and for uses determined by the government. As long as the government is aware of known hazards, the decision to take the risk is made by the government, and it would be destructive of the procurement process and thereby detrimental to national security itself to hold manufacturers liable for injuries caused by the military's use of their products. Costs of procurement would escalate if contractors were exposed to liability. Contractors would find insurance difficult or impossible to procure, and bankruptcies might occur among companies supplying products essential to national security. Firms would take steps to avoid entering into government contracts, including resort to litigation. The effect on procurement would be particularly acute where claims of toxic exposure might be made and the number of potential claimants would be impossible to determine.

We also note that, absent the shield of the military contractor defense, the legal exposure of the contractor would be much greater than the exposure of a manufacturer that sells to a private corporation that uses its product. In the latter case, the user corportion will also be a defendant

and bear some or all of the exposure. Under *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), however, the government cannot be sued and need not even cooperate with the contractor in defending personal injury litigation. Obtaining discovery from the government as a non-party might be difficult or even barred by a claim of national security privilege. The military contractor thus faces the great exposure of being the sole "deep pocket" available. In the instant matter, for example, the United States has avoided all claims against it and has refused to participate in settlement negotiations. Moreover, while the Veterans' Administration ("VA") and the Congress have declined to recognize any ailments other than chloracne and porphyria cutanea tarda ("PCT"), a rare liver disorder, as related to Agent Orange exposure, *see infra,* the chemical companies found it prudent to pay $180 million notwithstanding the weakness of the plaintiffs' case.

At various stages in this litigation, Judge Pratt and Chief Judge Weinstein articulated somewhat different standards to govern the military contractor defense. Judge Pratt stated that each defendant would be required to prove the following elements:

> 1. That the government established the specifications for "Agent Orange";
>
> 2. That the "Agent Orange" manufactured by the defendant met the government's specifictions in all material respects; and
>
> 3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange".

In re "Agent Orange" Product Liability Litigation, 534 F.Supp. at 1055. In elaborating on the third element, Judge Pratt stated that a defendant could not employ the defense if it "was aware of hazards that might reasonably have affected the government's decision about the use of 'Agent Orange,' " *id.* at 1057, but failed to disclose them to the government. *Id.* at 1058.

After discovery and various motions, Judge Pratt concluded that disputes of material fact were involved in determining the third element – the relative knowledge possessed by the government and the chemical companies. *See In re "Agent Orange" Product Liability Litigation,* 565 F.Supp. at 1275. However, he concluded that all defendants were entitled to summary judgment with respect to the first two elements – that the government established the specifications for Agent Orange and that the Agent Orange manufactured by the defendants met these specifications in all material respects. *See id.* at 1274.

In approving the settlement, Chief Judge Weinstein addressed the military contractor defense as a potential bar to recovery by the plaintiffs. *See Settlement Opinion,* 597 F.Supp. at 843-50. While adopting the first two elements of the defense as defined by Judge Pratt, he modified the third element as follows:

> A plaintiff would be required to prove, along with the other elements of his cause of action, that the hazards to him that accompanied use of Agent Orange were, or reasonably should have been known, to the defendant. The burden would then shift to each individual defendant to prove (1) that the government knew as much as or more than that defendant knew or reasonably should have known about the dangers of Agent Orange or (2), even if the government had had as much knowledge as that defendant should have had, it

> would have ordered production of Agent Orange in any event and would not have taken steps to reduce or eliminate the hazard.

Id. at 849. "In practical terms," Chief Judge Weinstein explained, this standard means "that a defendant would not be liable despite the fact that it negligently produced a defective product if it could show either that the government knew of the defect or that it would not have acted any differently even if it had known." *Id.* at 850.

We need not define the precise contours of the defense because we believe that under any formulation, and regardless of which party bears the burden of proof, the defendants here were entiled to summary judgment.

Agent Orange was a product whose use required a balancing of the risk to friendly personnel against potential military advantage. That balancing was the exclusive responsibility of military professionals and their civilian superiors. The responsibility of the chemical companies was solely to advise the government of hazards known to them of which the government was unaware so that the balancing of risk against advantage was informed.

Given the purpose of the duty to inform, a hazard that triggers this duty must meet a two-pronged test. First, the existence of the hazard must be based on a substantial body of scientific evidence. A court addressing a motion for summary judgment based on the military contractor defense must thus look to the weight of scientific evidence in determining the existence of a hazard triggering the duty to inform. The hazard cannot be established by mere speculation or idiosyncratic opinion, even if that opinion is held by one who qualifies as an expert under Fed.R.Evid. 702. A military contractor is no more obligated to inform the gov-

ernment of speculative risks than it is entitled to claim speculative benefits. Second, the nature of the danger to friendly personnel created by the hazard must be serious enough to call for a weighing of the risk against the expected military benefits. Otherwise, the hazard would not be substantial enough to influence the military decision to use the product. Neither prong of the test is satisfied in the case of Agent Orange.

The use of Agent Orange in Vietnam was believed necessary to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas. Its success as a herbicide saved many, perhaps thousands of, lives. At the time of its use, both the government and the chemical companies possessed information indicating that dioxin posed some danger to humans. Indeed, there is evidence that the chemical companies feared that the presence of dioxin in Agent Orange might lead the government to restrict the sale of pesticides and herbicides in the civilian market. *See* P. Schuck, *Agent Orange on Trial* 85-86 (1986). However, the knowledge of the government and the chemical companies related to chloracne and certain forms of liver damage, ailments now known to be very rare among Vietnam veterans, and not to the numerous other ailments alleged in the instant litigation. Moreover, for the reasons stated in Chief Judge Weinstein's opinions, *see Opt-Out Opinion,* 611 F.Supp. at 1263; *Settlement Opinions,* 597 F.Supp. at 795-99, we agree that the critical mass of information about dioxin possessed by the government during the period of Agent Orange's use in Vietnam was as great as or greater than that possessed by the chemical companies. Nevertheless, the government continued to order and use Agent Orange. The second prong of the test is therefore not met.

Because of the paucity of scientific evidence that Agent Orange was in fact hazardous, the first prong also is not met. This is not a case in which a hazard is known to have existed in hindsight and the issue is whether the defendant had sufficient knowledge at an earlier time to trigger an obligation to inform. Rather, this is a case in which subsequent study indicates the absence of any substantial hazard and therefore negates any claim that the chemical companies breached a prior duty to inform.

When Agent Orange was being used in Vietnam, there was some evidence, possessed as we have said by both the government and the chemical companies, relating chloracne and liver damage to exposure to dioxin. Of course, the fact that dioxin may injure does not prove the same of Agent Orange, which contained only trace elements of dioxin. The precise hazard of the herbicide, if any, was thus a matter of speculation at the time of its use. Now, some 15 to 25 years after military personnel were exposed to Agent Orange, we have considerably more information about the effects of Agent Orange. As noted in our Opinion upholding the settlement, 818 F.2d 145, and explained in greater detail in the district court's opinions approving the settlement, 597 F.Supp. at 787-95, and granting summary judgment against the opt-outs, 611 F.Supp. at 1231-34, epidemiological studies of those very personnel and their families fail to show that Agent Orange was hazardous, even with regard to chloracne and liver damage. While the decisions to use Agent Orange were being made, the most relevant question was not, "What will dioxin do to animals?" or even, "What will dioxin do to humans exposed to it in industrial accidents?" The most relevant question was, "What will Agent Orange do to friendly personnel exposed to it?" The epidemiological studies ask the latter question hindsight and answer, "Nothing

harmful so far as can be told." The fact that the epidemiological studies do not exclude the possibility of harm in isolated or unusual cases or in future cases is of no moment because it does not constitute evidence material to the military decisions in question. Hardly any product of military usefulness is known to be absolutely risk free. Consequently, the existence of a hazard of which the government should have been informed remains unproven to this date, long after the relevant events. Indeed, although chloracne is a leading indicator of exposure to dioxin, it is very rare among Vietnam veterans. Accordingly, there never was information about material hazards that should have been imparted by the chemical companies to the government.

The military decision to use Agent Orange was, therefore, not ill-informed, much less ill-informed as a result of any action by the chemical companies. This conclusion is underscored by the actions of the VA and the Congress in addressing claims by veterans asserting injury by Agent Orange. The VA has recognized only chloracne and PCT as ailments related to Agent Orange. By May 1984, it had granted only 13 chloracne and two PCT claims. It later concluded that none of the 13 chloracne claims actually involved chloracne. *See Settlement Opinion,* 597 F.Supp. at 856 (citing remarks of Senator Cranston). In adopting the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (1984), Congress declined to compensate veterans claiming exposure to Agent Orange for ailments other than chloracne and PCT. It thus rejected earlier versions of the Act that would have compensated such veterans for other medical conditions, including soft tissue sarcomas and birth defects. *See* M. Gough, *Dioxin, Agent Orange* 225 (1986); *Settlement Opinion,* 597 F.Supp. at 855-57 (E.D.N.Y. 1984) (discussing earlier legislation).

The VA and the Congress thus continue to act on the factual conclusion that Agent Orange was hazardous, if at all, only with regard to chloracne and PCT. We believe these actions further demonstrate that the military decision to use Agent Orange was fully informed. To hold the chemical companies liable in such circumstances would be unjust to them and would create a devastating precedent so far as military procurement is concerned.

Affirmed.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

Gerald HOGAN, M.D.,
Plaintiff-Appellant,

v.

The DOW CHEMICAL COMPANY; Diamond Shamrock Chemicals Company; Hercules Incorporated; Monsanto Company; T H Agriculture & Nutrition Company, Inc.; and Uniroyal, Inc., Defendants-Appellees.

Clara FRATICELLI, et al.,
Plaintiffs-Appellants,

v.

The DOW CHEMICAL COMPANY; Diamond Shamrock Chemicals Company; Hercules Incorporated; Monsanto Company; T H Agriculture & Nutrition Company, Inc.; Uniroyal, Inc.; the United States of America; and Ten Former Regents of the University of Hawaii, Defendants; Appellees.

Nos. 1084, 1110, 1111 and 1137, Dockets 85-6161, 86-6223, 86-6339 and 86-6341.

United States Court of Appeals,
Second Circuit.

Argued April 10, 1986.

Decided April 21, 1987.

Before VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

The above captioned appeals raise a number of issues distinct from that of causal relation, the dominant issue in most Agent Orange cases, and will be disposed of largely on the basis of those unrelated issues. The appeals are from a dismisssal pursuant to Fed. R. Civ. P. 37(b)(2) and from summary judgments, granted by Chief Judge Weinstein of the United States District Court for the Eastern District of New York in opinions reported at 611 F. Supp. 1290 and 611 F. Supp. 1285. The Rule 37(b)(2) dismissal was against Dr. Gerald Hogan, a resident of Nevada. The summary judgments dismissed the complaints of three residents of Hawaii, James K. Oshita and Masao Takatsuki, who sue for personal injuries, and Clara Fraticelli, who sues for the wrongful death of her husband, William. Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, 818 F.2d 145. For purposes of convenience, the appeals were briefed and argued together.

THE HOGAN APPEAL

In 1966, Gerald Hogan, a thirty-five-year old doctor, spent four months in Vietnam under contract with the United States Agency for International Development. For one month, he worked at a civilian hospital in Da Nang. During the remaining three months, he was a patient in a United States hospital in the same city. He now claims that a variety of illnesses from which he suffers were caused by exposure to Agent Orange which had accumulated on the clothing of native patients or was carried by dust in the air.

In 1981, Dr. Hogan sued to recover for his injuries, and,

in due course, his case became part of the multidistrict litigation in the Eatern District of New York. On March 15, 1985, the magistrate appointed by Chief Judge Weinstein to control discovery ordered that Dr. Hogan's oral deposition be taken on March 21 and 22. The deposition was commenced in the yard of Dr. Hogan's home but was discontinued after several hours when Dr. Hogan, claiming that he was suffering from cardiac arrhythmia (an alteration in the rhythm of the heart beat), refused to continue. The magistrate ordered plaintiff examined by an independent physician, who reported that the deposition could be continued without adversely affecting the plaintiff's health. Nonetheless, with a conceded understanding of the possible consequences of his refusing to continue with the deposition, Dr. Hogan refused. The district court found that plaintiff's claim of ill health was unfounded, "an excuse to prevent being embarrassed by a searching deposition", and a "blatant attempt to frustrate discovery." 611 F. Supp. at 1294-95.

In view of the district court's factual findings, which are not clearly erroneous, and Dr. Hogan's awareness of the consequences of his refusal to obey the magistrate's order, we reject Dr. Hogan's contention that the district court erred in dismissing his complaint. Although dismissal unquestionably was strong medicine, the "[h]arshest of all . . . orders," *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979), disposition of the almost unprecedented volume of Agent Orange cases would be interminably delayed if the participants were permitted to disobey court orders with little fear of sanction. In litigation of such epic proportions as this, it is particularly important that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district

court . . . , not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976); *see United States Freight Co. v. Penn Central Transp. Co.*, 716 F.2d 954 (2d Cir. 1983) (per curiam); *Trans World Airlines, Inc. v. Hughes,* 332 F.2d 602, 615 (2d Cir. 1964), *cert. dismissed,* 380 U.S. 248 and 249, 85 S.Ct. 934, 13 L.Ed. 2d 817 and 818 (1965). The judgment of the district court is affirmed.

THE HAWAIIAN APPEALS

In 1967, while James Oshita, Masao Takatsuki and William J. Fraticelli were working for the University of Hawaii at its College of Tropical Agriculture and Human Resources, they allegedly sustained injuries caused by exposure to Agent Orange which was being tested in the fields by University employees. All three filed Worker's Compensation claims, Oshita and Fraticelli in 1979 and Takatsuki in 1981, and all were awarded benefits. Fraticelli died in April 1981. On January 12, 1981, Oshita and Takatsuki presented administrative claims to the United States pursuant to 28 U.S.C. § 2401(b), no such claim has been filed by Fraticelli's widow, Clara. On January 11, 1982, Oshita, Takatsuki and Clara Fraticelli, on behalf of herself and her husband's estate, commenced this suit in the United States District Court for the District of Hawaii seeking relief not only for themselves but also for a proposed class consisting of everyone on the Island of Kauai who had been exposed to Agent Orange. In addition to the several chemical companies which allegedly

manufactured the injurious herbicide, the complaint named as defendants ten Regents or former Regents of the University of Hawaii, together with the United States and its Department of Defense. Over the objection of the plaintiffs, the case was transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation.

In Hawaii, an action for personal injuries must be brought within two years after the cause of action accrues. Haw. Rev. Stat. § 657-7. A claim accrues under this statute when the plaintiff discovers or reasonably should have discovered the complained of act, the injury and the causal connection between the two. *Yamaguchi v. Queen's Medical Center,* 65 Haw. 84, 648 P.2d 689 (1982). The district court held that, insofar as the plaintiffs' personal injury claims were concerned, the two-year statute, started to run no later than 1979, and appellants concede that the Hawaiian statute, standing alone, would have barred their common-law personal injury claims prior to the bringing of their suits in 1982. However, relying on *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983), they contend that the running of the statute was tolled by the bringing of the principal Agent Orange class action. This reliance is misplaced.

The limitation periods of *American Pipe and Crown, Cork* were derived from federal statutes. Here, we are dealing with Hawaii's limitation statutes. Because none of them provides for tolling in a situation such as exists here, it is doubtful that either *American Pipe or Crown, Cork* can be treated as applicable precedent. *See Chardon v. Fumero Soto,* 462 U.S. 650, 660-62, 103 S. Ct. 2611,

2618-19, 77 L. Ed. 2d 74 (1983); *Board of Regents v. Tomanio,* 446 U.S. 478, 483-86, 100 S. Ct. 1790, 1794-96, 64 L. Ed. 2d 440 (1980); *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 466-67, 95 S. Ct. 1716, 1723, 44 L.Ed.2d 295 (1975).

We note, however, Justice Rehnquist's categorical statement in his *Chardon* dissent that "[i]f the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable." 462 U.S. at 667, 103 S. Ct. at 2621. Assuming that for "the purposes of litigatory efficiency served by class actions", *Johnson, supra,* 421 U.S. at 467 n. 12, 95 S. Ct. at 1723 n. 12, the district court agreed with this observation, Oshita's and Takatsuki's claims against the chemical companies still were properly barred.

In *American Pipe,* the Court declared the pertinent tolling rule to be that the commencement of a class action tolls the applicable statute of limitations "as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554, 94 S. Ct. at 766. In the instant case, the principal Agent Orange action upon which these personal injury claimants base their claim of tolling was certified as a class action and continued as such until it was settled. These Hawaiian claimants never became part of that action. Instead, as stated above, they attempted unsuccessfully to initiate their own class action on behalf of the populace of Kauai. Moreover, their attorney, in an affidavit opposing the removal of their action to the Eastern District of New York, stated that the issues involved in the Hawaiian plaintiffs' suit were "substantially different" from those in the other actions and that the causes of action were

"separate and distinct" from those in the already-removed actions. To some extent, at least, he was correct.

From the very outset, the district court recognized the principal Agent Orange class action as one brought on behalf of "Vietnam war veterans and members of their families claiming to have suffered damage as a result of the veterans' exposure to herbicides in Vietnam." 506 F. Supp. 762, 768. This recognition was based upon a fair reading of the original class action complaints. The class which the district court certified consisted of such veterans, their spouses, parents, and children, who were injured as a result of the veterans' Vietnam exposure. 100 F.R.D. 718, 731-32.

The intent of the *American Pipe* rule is to preserve the individual right to sue of the members of a proposed class until the issue of class certification has been decided. *Crown, Cork, supra,* 462 U.S. at 354, 103 S. Ct. at 2398 (Powell, J., concurring). Its purpose is not to toll the statute of limitations for persons such as these Hawaiian plaintiffs who were not members of either the proposed or certified class. The district court did not err therefore in dismissing the personal injury claims as against the chemical companies and the University of Hawaii Regents. However, because Mrs. Fraticelli's cause of action for the wrongful death of her husband did not accrue until his death in 1981, Haw. Rev. Stat. § 663-3, her action against the chemical companies, brought in 1982, was not barred by the two-year personal injury statute of limitations, Haw. Rev. Stat. § 657-7.

Dismissal of all personal injury and related wrongful death claims against the Regents was required because the Hawaiian compensation statute provides the exclusive remedy against fellow employees for work-

related injuries. Haw. Rev. Stat. § 386-5. Appellants' claim under 42 U.S.C. § 1983 against the Regents, based on the same injuries, is so devoid of merit, *see Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *McClary v. O'Hare,* 786 F.2d 83 (2d Cir. 1986), that appellants do not even contend on appeal that their action against the Regents should be reinstated.

Although the timeliness of actions against the United States is not governed by the Hawaiian statute of limitations, section 2401(b) of 28 U.S.C. provides time limitations that are more restrictive in that they are jurisdictional in nature. That section provides in substance that a tort claim against the United States is barred unless made in writing to the appropriate federal agency within two years after the claim accrues and an action is brought thereon within six months after the claim is denied. The burden is on the plaintiff to both plead and prove compliance with the statutory requirements. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182, 56 S. Ct. 780, 782, 80 L. Ed. 1135 (1936); *Altman v. Connally,* 456 F.2d 1114, 1116 (2d Cir. 1972) (per curiam); *Bruce v. United States,* 621 F.2d 914, 918 (8th Cir. 1980); *Clayton v. Pazcoquin,* 529 F. Supp. 245, 247-49 (W.D. Pa. 1981). In the absence of such compliance, a district court has no subject matter jurisdiction over the plaintiff's claim. *Wyler v. United States,* 725 F.2d 156, 159 (2d Cir. 1983).

Plaintiff's complaint does not allege that the filing requirements of section 2401(b) were complied with. Moreover, it appears to be conceded that Mrs. Fraticelli did not file a claim for her husband's death. Because of Mrs. Fraticelli's failure to file, her complaint against the United States should have been dismissed for lack of jurisdiction. *Gallick v. United States,* 542 F. Supp. 188,

191 (M.D. Pa. 1982). However, the Government concedes that Oshita and Takatsuki filed claims, and therefore the complaint could be amended upon remand to allege that fact. Accordingly, we will assume an amendment and address their claims on the merits.[1]

A well-recognized exception to the Government's waiver of immunity for tort liability is the "discretionary function" exception found in 28 U.S.C. § 2680(a). The governmental acts of which the Hawaiian plaintiffs complain fall within this exception. It cannot be serioiusly contended that the decision to use Agent Orange as a defoliant was anything but a discretionary act. In pursuance of this decision, the Government entered into a contract with the University of Hawaii to perform field tests with the herbicide. Plaintiffs, who claim to have been injured during the course of those field tests, cannot remove them from the category of discretionary functions by vague and irrelevant allegations of negligent labeling, shipping, handling, etc. *See Dalehite v. United States,* 346 U.S. 15, 37-45, 73 S. Ct. 956, 969-72, 97 L. Ed. 1427 (1953); *First National Bank in Albuquerque v. United States,* 552 F.2d 370, 374-77 (10th Cir.), *cert. denied,* 434 U.S. 835, 98 S. Ct. 122, 54 L. Ed. 2d 96 (1977).

The Supreme Court's holding in *Dalehite* is summarized well in *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810-11, 104 S. Ct. 2755, 2762-63, 81 L. Ed. 2d 660 (1984), where Chief Justice Burger, writing for the Court, said:

> *Dalehite* involved vast claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fer-

[1] If addressed on the merits, Mrs. Fraticelli's claim would be disposed of in the same manner as Oshita's and Takatsuki's.

> tilizer, which had been produced and distributed under the direction of the United States for export to devastated areas occupied by the Allied Armed Forces after World War II. Numerous acts of the Government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.
>
> The Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the action barred by § 2680(a).

In *Varig,* the Court held that the failure of Federal Aviation Administration employees to check certain potentially dangerous items in certifying the safety of an airplane was the exercise of a discretionary function for which the Government was not liable. 467 U.S. at 820, 104 S.Ct. at 2767.

These two decisions teach us that, where, as here, the Government is performing a discretionary function, the fact that discretion is exercised in a negligente manner does not make the discretionary function exception inapplicable. *See also Cisco v. United States,* 768 F.2d 788, 789 (7th Cir. 1985); *Begay v. United States,* 768 F.2d 1059, 1062-66 (9th Cir. 1985); *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243, 245 (3d Cir. 1984), *cert. denied,* 469 U.S. 1228, 105 S. Ct. 1227, 84 L. Ed. 2d 365 (1985); *Green v. United States,* 629 F.2d 581, 585-86 (9th Cir. 1980).

The dismissal of appellant Hogan's complaint pursuant to Fed. R. Civ. P. 37(b)(2) is affirmed. The sum-

mary judgment in favor of appellees and against appellants, Oshita and Takatsuki, is affirmed. The chemical companies moved for summary judgment against Mrs. Fraticelli on the ground that her claim was barred by the military contractor defense. The district court did not rule upon this claim, and we address it only in general terms. Mr. Fraticelli was a civilian. Nevertheless, his exposure to Agent Orange occurred after the United States government had purchased the herbicide and while the government was testing it for military use. We believe, therefore, that the military contractor defense, as discussed in Judge Winter's opinion affirming summary judgment against the opt-out plaintiffs, 818 F.2d 187, applies to Mrs. Fraticelli's claim. We vacate the dismissal of her claim and remand to the district court for a determination on the motion for summary judgment. The summary judgment dismissing Fraticelli's cause of action against the United States is vacated and this cause of action is remanded to the district court with instructions to dismiss for lack of jurisdiction. No costs to any party.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of June one thousand nine hundred and eighty-seven.

. . . . . .

IN RE:

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION	Docket No. 85-6163*,85-6269, 85-6337

. . . . . .

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Persons Who Opted Out Of The Class Action.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Filed: June 3, 1987

Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 5th day of June one thousand nine hundred and eighty-seven.

. . . . . .

IN RE:

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION	Docket No. 84-6273* (L)

. . . . . .

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Objectors to the Class Action Settlement.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Filed: June 5, 1987

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of June one thousand nine hundred and eighty-seven.

.....

IN RE:

"AGENT ORANGE"
PRODUCT LIABILITY
LITIGATION

Docket No. 85-6339
85-6341
85-6161
85-6223

.....

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants—Dr. Gerald Hogan and the Hawaiian Plaintiffs.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Filed: June 3, 1987

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOTICE OF MOTION FOR CONTINUED STAY OF MANDATE

In re "Agent Orange":	:	**Nos:**
	:	**84-6273, 84-6321, 85-6035,**
Product Liability Litigation	:	**85-6051, 85-6083, 85-6261,**
(Objectors to the Class Action	:	**85-6265, 85-6301, 85-6303,**
Settlement)	:	**86-6307, 85-6323, 85-6325,**
	:	**85-6327, 85-6329, 85-6335,**
	:	**85-6349, 85-6371, 85-6373,**
	:	**85-6379, 85-6381, 85-6385,**
	:	**85-6387, 86-6393, 85-6395,**
	:	**85-6411**

MOTION BY: Wayne M. Mansulla, Esq.
ASHCRAFT & GEREL
2000 L Street, N.W. #700
Washington, D.C. 20036

Brief Statement Of The Relief Requested:

Appellants request that this Court continue its Stay of Mandate issued on July 17, 1987 until the United States Supreme Court rules on Appellants' Petition for Writ of Certiorari.

By:	Appearing For:	Date:
_____	Objectors to the Class	8/5/87
Wayne M. Mansulla	Action Settlement	

ORDER

Before: Hon. Ellsworth A. VanGraafeiland, Hon. Ralph K. Winter and Hon. Roger J. Miner, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

Filed: August 7, 1987

FOR THE COURT:
Elaine B. Goldsmith, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOTICE OF MOTION FOR CONTINUED STAY OF MANDATE

In re "Agent Orange":	:	
	:	**Nos:**
Product Liability Litigation	:	**85-6339, 85-6341, 85-6161,**
(Dr. Gerald Hogan & The Hawaiian Plaintiffs)	:	**85-6223**
	:	

MOTION BY: Wayne M. Mansulla, Esq.
ASHCRAFT & GEREL
2000 L Street, N.W. #700
Washington, D.C. 20036

Brief Statement Of The Relief Requested:

Appellants request that this Court continue its Stay of Mandate issued on July 17, 1987 until the United States Supreme Court rules on Appellants' Petition for Writ of Certiorari.

By:	Appearing For:	Date:
_____	Dr. Gerald Hogan & Hawaiian	8/5/87
Wayne M. Mansulla	Plaintiffs	

ORDER

Before: Hon. Ellsworth A. VanGraafeiland, Hon. Ralph K. Winter and Hon. Roger J. Miner, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

Filed: August 7, 1987

FOR THE COURT:
Elaine B. Goldsmith, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOTICE OF MOTION FOR CONTINUED STAY OF MANDATE

In re "Agent Orange":	:	
	:	
Product Liability Litigation	:	**Nos:**
(Persons who Opted-Out Of	:	**85--6163, 85-6269, 85-6337**
The Class)	:	

MOTION BY: Wayne M. Mansulla, Esq.
ASHCRAFT & GEREL
2000 L Street, N.W. #700
Washington, D.C. 20036

Brief Statement Of The Relief Requested:

Appellants request that this Court continue its Stay of Mandate issued on July 17, 1987 until the United States Supreme Court rules on Appellants' Petition for Writ of Certiorari.

By:	Appearing For:	Date:
_____	Persons Who Opted-	8/5/87
Wayne M. Mansulla	Out Of The Class	

ORDER

Before: Hon. Ellsworth A. VanGraafeiland, Hon. Ralph K. Winter and Hon. Roger J. Miner, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

Filed: August 7, 1987

FOR THE COURT:
Elaine B. Goldsmith, Clerk

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and eighty-seven.

Present: Hon. Ellsworth A. VanGraafeiland	:	Hon. Ellsworth A. VanGraafeiland
Hon. Ralph K. Winter	:	Hon. Amalya L. Kearse
Hon. Roger J. Miner	:	Hon. Roger J. Miner

Circuit Judges,

	:	**Docket Nos.: 84-6273,**
	:	**6321, 85-6035, 6051,**
	:	**6083, 6261, 6265, 6301,**
	:	**86-6303, 85-6309, 6323,**
	:	**6325, 6327, 6329,**
	:	**85-6335, 85-6349, 85-6371,**
	:	**85-6373, 85-6379, 85-6381,**
	:	**85-6385, 85-6387, 6393,**
	:	**6395, 6411, 86-3039,**
	:	**3042, 6171, 6173, 6174,**
	:	**85-6163, 6269, 6337,**
IN RE "AGENT ORANGE"	:	**85-6091, 6093, 6095,**
PRODUCT LIABILITY	:	**86-6127, 85-6161, 6223,**
LITIGATION	:	**6339, 6341, 85-6153,**
	:	**6165, 6225, 6231, 6263,**
	:	**6287, 6289, 6293, 6295,**
	:	**6375, 6377, 85-6365,**
	:	**85-6305, 6325, 6343,**
	:	**6345, 6347, 6351, 6353,**
	:	**6355, 6357, 6359, 6361,**
	:	**6363, 6383, 6389, 6397,**
	:	**85-6061, 85-6143, 85-6145,**
	:	**85-6151, 85-6167, 85-6287,**
	:	**85-6289, 85-6293, 85-6295,**
	:	**85-6375, 85-6377, 85-6057.**

It is hereby ordered that the mandates in all cases in the Agent Orange Liability Litigation are stayed until August 7, 1987, on the conditon that petition(s) for writ of certiorari be filed in the United States Supreme Court on or before that date. In the event that a petition is not filed in any particular case, the mandate will issue in that case on August 10, 1987.

FOR THE COURT.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

VINCENT C. LOMBARDI, et al., Petitioners

v.

DOW CHEMICAL CO., et al., Respondents

In re "Agent Orange" Product Liability Litigation

LIST OF PARTIES BELOW

Kathleen Dowd, et al. v. Dow Chemical Co., et al., CV 79-467 filed in the United States District Court for the Eastern District of New York; Plaintiffs include: Robert L. Anderson, Ricky J. Briscoe, Robert A. Bara, Ronnie Burleson, Waitman S. Brown, David R. Bilgo, William I. Brumbaugh, III, Neil A. Burke, Clarence A. Burnett, Willie R. Best, Howard R. Bailey, Daniel Columbus Batts, William Chenevert, Gary Compher, Michael D. Caputo, Benito Castillo, Louis S. Carter, Landon C. Corbin, Robert D. Dekker, David E. Dyson, Lawrence Dolan, David L. Dawley, Douglas E. Duffield, William Frangis, Claude L. Fordyce, Michael H. Feen, Arthur Goodwin, Wayne L. Gagnon, Joseph John Gambino, Joseph J. Gillen, John R. Greet, Gordon Hager, Jr., Donald R. Hamilton, Jr., Ronald E. Hampton, Ronnie Hart, Kenneth R. Hinton, Anton Horton, Charles Hummer, Judith Forbes Hennig, David P. Hughes, Jr., Jimmy J. Hudnell, Paul Iaderosa, James M. Johnson, Earl F. Jones, John A. Jones, Sr., Wyman Joyner, Wiley D. Johnson, Richard

Kubsick, Alfred E. Kyliavas, Dennis L. Letto, Ronald Lazenby, John R. Lucas, James McLaughlin, Michael J. McKenna, Michael Mitchell, John L. Maynard, John Allen Malewicz, Michael Marcoccia, Frederick P. Mace, James D. Matthews, James H. McLaughlin, Harrison Mosley, Eugene R. New, Barry Nesmith, George M. O'Hara, Richard J. O'Donnell, Edith G. Presco, for Ernst Jones (deceased), Dickee A. Pennington, Roy Pitzen, John S. Pyles, Robert C. Padgett, Jr., Kathleen Ribant, Michael J. Roach, Sr., Dennis L. Roach, Newman R. Roberts, Leonard F. Robinson, Richard G. Robinson, Ismael Rodriguez, Jose Rodriguez, Alan T. Rockoff, Earlie Robinson, Jr., Roger Rice, Frankie L. Schumpert, Michael A. Snarski, Donald S. Sauls, Daniel W. Sweet, Joseph F. Thomas, Charles M. Thomas, Jr., Kenneth Tridle, Dale R. Turnbill, Richard Woodman, James M. Walker, Tilden C. Willet, Roland A. Williams, Joseph E. Williams, Hugh William White, Jr., Asberry York, Jr.

Vincent C. Lombardi, et al. v. Dow Chemical Co., et al., CV 80-1989, filed in the United States District Court for Maryland; Plaintiffs include: Marvin W. Abbott, Joseph N. Anthony, Melvin M. Augustyniak, Elmer L. Ault, Carl F. Atwell, Neil A. Burke, Vincent P. Bonolis, Robert R. Barracca, David A. Biemiller, John H. Conway, James R. Carter, Bruce E. Decker, Michael H. Fenn, Milton P. Gibbs, Eugene G. Grabill, Michael A. Haviland, John M. Holloway, William H. Hall, Robert A. Horton, Michael L. Huber, James A. Huff, James O.F. Johns, Robert A. Juliano, George W. Jones, Charles F. Kosack, Harry F.W. Klein, Jr., Thomas W. Keown, III, Michael G. McNally, Arthur McEvers, William T. McCutcheon, Stephen N. Prunty, Henry J. Peterson, Jr., John A. Smith, Thomas W. Spear, Gary W. Spencer, Lawrence G. Spedden, Nickolos W. Soffos, Benjmain F. Waulk, Joseph T. White, Bruce H. Wilkins, Charles J. Wynn.

Leroy Brooks, et al. v. Dow Chemical Co., et al., CV 80-2002, filed in the United States District Court for the District of Columbia.

Marvin W. Abbott, et al. v. Dow Chemical Co., et al., CV 80-2284, filed in the United States District Court for the District of Maryland; Plaintiffs include: George W. Audet (deceased veteran, by wife, Lillian S. Audet), James O.F. Johns (deceased veteran, by wife, Cynthia Johns), John Lilley (deceased veteran by wife, Anna M. Lilley), Gene W. Moore (deceased veteran by wife, Eleanor Moore).

John P. DeAngelo, et al. v. Dow Chemical Co., et al., CV 80-2631, filed in the United States District Court for the District of Maryland; Plaintiffs include: Marvin W. Abbott, Lloyd T. Brown, Charles S. Calvert, Robert T. Campbell, Oral Ray Carter, Jerry H. Chosack, Frank W. Cockrell, Robert J. Foley, Jr., John P. Grosskopk, James J. Hersl, Anthony W. Jordan, Gregory L. Justice, James F. Johnson, John F. Johnson, Edward R. Kriston, Michael E. Lerp, Russell Lewis, Claude R. Lindsay, James V. Lux, Vernon F. Mitchell, Dallas W. Moore, Jr., Ronald E. Nevins, Scott S. Pennewell, Donald E. Ross, James Skazis, David L. Schascheck, John E. Stokes, IV, Roland A. Stridiron, James L. Thiess, Jorge E. Vazquez, William O. Ward, Jr., John N. White, Paul A. Woods.

Irene Gaither, et al. v. Dow Chemical C., et al., CV 80-2997, filed in the United States District Court for the Northern District of West Virginia; Plaintiffs include: Robert Gaither (deceased veteran, by wife, Irene Gaither).

J. Michael Gibbs, et al. v. Dow Chemical Co., et al., CV 81-0662, filed in the United States District Court for the Southern District of Georgia, Brunswick Division; Plaintiffs include: Abram Brown, John Richard Douberly, Al-

vin Leon Gardner, David Jack Hutchinson, Ronnie L. Jones, Jasper N. Lynn, Larry Thomas Price.

Tyronne Clark, et al. v. Dow Chemical Co., et al., CV 81-0995, filed in the United States District Court for the Middle District of Florida, Jacksonville Division; Plaintiffs include: David R. Griffith, Daniel Morgan, Newman R. Roberts, Elmer Rice, Jr., Thomas E. Townsend.

Certain Named Veterans, et al. v. Dow Chemical Co., et al., CV 81-1006, filed in the United States District Court for the Eastern District of New York; Plaintiffs include: James W. Brown, Robert C. Buckley, Cornad C. Cain, Jerrold Charlet, Leonard W. Cooper, Jr., James Cleveland, Garry E. Dabbs, William James Gordy, Sr., Eddie Gene Hamby, Albert C. Huggard, Bernard E. Johnson, Thomas Kassay, Jeremiah R. Leary, Jerry E. Lewis, William A. McKay, Jr., Alfred Moore, Donald Norris, Ronald Pastuch, Johnny C. Reynolds, Armando Rodriguez, Frank E. Scozzafava, Robert S. Slowik, James Smith, Otis Watson, Jr.

Christopher James Moeller, et al. v. Dow Chemical Co., et al., CV 81-2719, filed in the United States District Court for the District of Columbia; Plaintiffs include: Christopher James Moeller (deceased veteran by wife, Roberta Moeller).

Mary Ellen Simko, et al. v. Dow Chemnical Co., et al., CV 81-2721, filed in the United States District Court for the District of New Hampshire; Plaintiffs include: Robert F. Simko (deceased veteran, by wife, Mary Ellen Simko).

Michael F. Donovan, et al. Dow Chemical Co., et al., CV 82-0783, filed in the United States District Court for the District of Masschusetts; Plaintiffs include: Edward F. Duarte, Donald R. Hamilton, Jr.

Gerald L. Houp, et al. v. Dow Chemical Co., et al., CV 82-0861, filed in the United States District Court for the Southern District of Ohio, Western Division.

Ronald B. Allen, et al. v. Dow Chemical Co., et al., CV 82-1749, filed in the United States District Court for the District of Maryland; Plaintiffs include: Arthur S. Anderson, Howard S. Beaghan, William O. Beall, Thomas H. Blue, Allen Brown, Edward A. Brown, Julian H. Brown, Darrell M. Callahan, Edward E. Campell, Bert M. Carr, Sr., Robert T. Cesare, Wallace L. Christian, Donald D. Clarke, William D. Coleman, Daniel J. Conlan, Aroy Crowell, Melvin J. Frazetti, Douglas R. French, Michael J. Fusco, David T. Frasca, Wayne C. Garafolo, Paul D. Huff, Lawrence M. Hall, Lawrence E. Hawkins, Donald E. Head, Albert A. Hernandez, David C. Hughes, Sr., Larry B. Hunter, James S. Hurd, Jr., Thomas L. Hurtt, Willie C. Johnson, Jr., Robert H. Jones, Jr., Alexander J. Juster, Michael J. Jonas, David F. Kind, Frederick P. Mace, Leon Manker, James L. McCumber, Lee W. McInturff, Stanley Lee Mitchell, Emanuel Moore, Frederick L. Moore, Thomas R. Morris, I, Craig W. Murphy, Melvin L. Myers, Lawrence E. Mize, Frederick Osterman, Gerrell Plummer, Lawrence M. Price, Millard H. Payne, Raymond Peele, Jr., James R. Steele, Jr., Richard Leon Sherman, John J. Silks, Raymond J. Simonetti, Jr., Charles E. Smith, William J. Smith, Stuart A. Snell, Ronald P. Spencer, Christopher A . Strehlen, Ronald C. Thaxton, Eugene W. Thomas, Richard E. Tobash, Henry J. Trogden, Robret J. Vaught, John B. Von Haack, Quinton C. Walker, Jr., Robert A. Watson, Sammie Webb, Jr., Richard M. Williams.

Michael J. Jonas, et al. v. Dow Chemical Co., et al., CV 82-4033, filed in the United States District Court for the District of Massachusetts; Plaintiffs include: Joel R. Watkins.

Charles H. Smith, et al. v. Dow Chemical Co., et al., CV 84-3821, filed in the Southern District of Ohio, Western Division, Cincinnati.